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PRIVATE INTERNATIONAL LAW IN NIGERIA

This book examines the rules, principles, and doctrines in Nigerian law for resolving cases involving cross-border issues. It is the first book-length treatise devoted to the full spectrum of private international law issues in Nigeria. As a result of increased international business transactions, trade, and investment with Nigeria, such cross-border issues are more prevalent than ever. The book provides an overview of the relevant body of Nigerian law, with comparative perspectives from other legal systems. Drawing on over five hundred Nigerian cases, relevant statutes and academic commentaries, this book examines jurisdiction in interstate and international disputes, choice of law, the enforcement of foreign judgments and international arbitral awards, domestic remedies affecting foreign proceedings, international judicial assistance in the service of legal processes and taking of evidence. Academics, researchers and students, as well as judges, arbitrators, practitioners and legislators alike will find *Private International Law in Nigeria* an instructive and practical guide.

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Chukwuma Samuel Adesina Okoli
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To Uchechi Chiazokam Okoli (nee Ibekwe)

FOREWORD

Let me start by thanking the authors of this book for giving me the honour of writing the foreword for this well researched, well-articulated and very well written text on private international law, or conflict of laws. It is always a pleasure to be asked to give the foretaste of a brilliant text.

Private international law, also known as conflict of laws, is that field of law that comes into play whenever a legal action contains a foreign element. It determines the choice of law and choice of forum of adjudication when a legal action implicates the substantive laws of more than one jurisdiction and a court has to determine which of the potentially applicable legal systems and fora is most appropriate to resolve the legal action. As I stated in an article titled 'The Concept of Territorial Jurisdiction',[1] while addressing the issue of conflict of law rules in Nigeria,

> Private International Law rules or conflict of law rules are the rules that apply to cases arising between private persons or States engaged in private transactions with contacts with two or more legal units. For purposes of conflict of laws, each of the thirty-six States and the Federal Capital Territory is a territorial unit possessing its own territorial system of conflict of laws. Private International Law is that department of law which arises from the fact that there are territorial jurisdictions possessing different laws and its purpose is to protect and ensure peaceful intercourse of private persons in different territories. It comes into play whenever an issue before the court contains a foreign element and, strictly speaking, the legal system of one constituent State is as much a foreign system of law as the legal system of another country. For instance, the law of Anambra State, in the eyes of a Lagos State High Court, is a foreign system of law as Canadian law is. The function of private international law is to ascertain which of several potentially applicable legal systems must be chosen to determine an issue in court.

In other words, for example, parties are resident in Lagos. A advances money to B to finance the leasing of equipment by B. One of the pieces of equipment leased is a 60KVA generating set, which is seized by C at the office of B in Anambra State. A commences an action in Lagos High Court against B and C claiming damages for detinue. Or, parties are resident in Kano State. A commences an action against B in the High Court of Kano State for recovery of a loan negotiated and obtained in London. The resolution of the questions whether the Lagos High Court and Kano State High Court have jurisdiction respectively to entertain the actions and

[1] Published in IO Smith (ed), *Law and Developments in Nigeria: Essays in Honour of Alhaji Femi Okunnu, SAN, CON* (Ecowatch Publications (Nig) Ltd, 2004) pp 10–11.

whether it is the law of place of residence of the parties or of the place of the occurrence of the event or of the place of the transaction that will apply to govern the actions are matters for private international law.

The legal practitioners and the Courts in Nigeria have over time struggled with the resolution of legal actions which have such foreign elements. The law reports are replete with decisions showing clear evidence of the struggle. The reason for the struggle has been the failure of the lawyers and Courts to appreciate that it is the rules of private international law that are applicable to these situations. Some of the lawyers and the Courts failed to put the issues that confronted them in such cases on their proper pedestal as having inter-State dimensions, rather than being an intra-State or an inter-judicial divisions matter. So they applied the provisions of the High Court (Civil Procedure) Rules dealing with the proper forum for commencing an action amongst the judicial divisions in a State rather that the conflict of law rules of the State in resolving the matters.

In other instances, the lawyers and the Courts became fixated with the provisions of Section 6(2) of the Constitution of the Federal Republic of Nigeria (as amended) which says that the judicial powers of a State shall be vested in the High Court of the State and the other Courts created for it in the Constitution and those it may create for itself. They interpreted the provisions to mean that the Courts of each State have powers to exercise the judicial powers of the State for which they were established and cannot exercise the judicial powers of another State, and they concluded from the interpretation that the High Court of a State cannot exercise jurisdiction over causes of action that occurred in another State or over persons in another State.

The difficulty faced by the lawyers and the Courts in understanding the pivotal role of private international law in resolving disputes with inter-State elements can be attributed to the dearth of legal materials, with local flavour, on the topic. This book, *Private International Law in Nigeria*, is a very welcome development as it is aimed at filling the void. It discusses the basic concepts of private international law such as characterisation and *renvoi* and the role they play in choice of law questions. It examines what qualifies as foreign law in Nigeria, amongst the States of the Federation and internationally, and the way and manner foreign law is pleaded and proved in the Nigerian Courts. It looks at the concept of domicile, as distinct from nationality and residence, and the different manners of acquiring domicile and its importance, particularly in matrimonial proceedings with international elements.

The book examines in extensive detail the jurisdiction of the Courts in matters with inter-State and international elements. Jurisdiction is a fundamental concept in judicial adjudication. Speaking on its importance, Oputa, JSC in *Attorney-General of Lagos State v Dosunmu*[2] stated that:

> … jurisdiction is a radical and crucial question of competence. Either the court has jurisdiction to hear the case or it has not. If it has no jurisdiction, the proceedings

[2] (1989) 3 NWLR (Pt. 111) 552.

> are and remain a nullity however well conducted and brilliantly decided they might otherwise have been. The reason is that a defect in competence is not intrinsic to, but rather, extrinsic to the adjudication.

The issue of jurisdiction must thus be properly resolved at the commencement of a matter. The book explains what lawyers and the Courts must look to in determining the Court of which State has jurisdiction in matters with inter-State and international elements and the folly of relying on the provisions of the Rules of Court and on Section 6 of the 1999 Constitution (as amended). It also explains the concept of assumed jurisdiction and the role played by the provisions of the Sheriffs and Civil Process Act in this regard.

The book deals extensively with the concepts of forum selection clauses in arbitration agreements, *forum non conveniens* and *lis alibi pendens* and how they all play out in private international law situations. It discusses the choice of law issues that arise in specific subject areas like contract, torts, foreign currency obligations, bills of exchange, marriage, matrimonial causes including children, property and succession and administration of estates. It explains in details the thorny issue of recognition and enforcement of foreign judgments and arbitral awards.

The book is an immense resource material on private international law, conflict of laws, for Judges, lawyers, law lecturers and law students in the Universities and a fantastic contribution to the legal jurisprudence and materials on the subject. I congratulate the authors for their foresight and resourcefulness in putting the work together. The book is a 'must have' for everyone involved in personal and business transactions that have inter-State and/or international elements.

Honorable Justice HAO Abiru
Justice of the Court of Appeal, Nigeria
1 October 2019

SERIES EDITOR'S PREFACE

Hart Studies in Private International Law is keen to publish all kinds of high-quality books on the topic of the Series. Since the Series started in 2009, 28 volumes have been published. There are many excellent monographs, often representing a revised version of the author's PhD but in several cases the mature reflection of a leading academic (eg Schuz on Child Abduction and Black on Foreign Currency Claims). The Series contains several well-regarded edited collections showcasing the work of many experts in the field and edited by some of the discipline's leading figures, including Basedow, Dickinson, Francq, Hess and Keyes. The Series is also a home to a materials book by a leading light (Bariatti), and to thorough reference books by renowned experts (eg Hill and Chong) and now, with this book, by Okoli and Oppong.

This book is the first full length, systematic treatment of Nigerian private international law. Doing something for the first time makes the authors pioneers. In this case they have navigated the unknown terrain with great skill. The authors bring their extensive knowledge of English and Commonwealth private international law to the table but are very careful to give primacy to Nigerian sources. The analysis of Nigerian primary sources – statutes, rules of court and case law – is comprehensive and the growing secondary literature is appropriately cited where relevant and can be found together in the bibliography. The authors very thoroughly analyse all the Nigerian cases concerning private international law. They are respectful of judicial opinions but, rightly, are not afraid to politely critique the case law and to suggest improvements to the law that could be made by judges and/or the legislature. There is a very powerful critique of Nigerian case law on jurisdiction in civil and commercial matters. In some areas it is clear that systematic reform would be helpful, eg the applicable law regimes for contract and tort.

Nigeria is an African superpower and one of the major global economies. It is very sad that it is not a member of the Hague Conference on Private International Law (HCCH) and nor is it a Party to any Hague Conventions. The authors, rightly, encourage Nigeria to become a member of HCCH and to become a Party to many of its Conventions. It can only be hoped that this book will be read by the key Government officials, judges, lawyers and academics who could unite in making Nigeria a leading player on the private international law world-stage. Nigeria could do this by becoming a member of the Hague Conference and becoming a Party to all of the following Conventions: Service (1965), Evidence (1970), Choice of Court (2005), Judgments (2019), Child Abduction (1980), Maintenance (2007), Intercountry Adoption (1993), Child Protection (1996), Divorce (1970), Adults (2000), Trusts (1985), and Form of Wills (1961). This package of the Hague

Statute and 12 Hague Conventions would make Nigeria a state-of-the-art hub for cross-border litigation and the resolution of cross-border disputes. It would give Nigeria the opportunity to be the leading State in Africa for private international law – potentially bringing more revenue from the provision of cross-border legal services. It could also offer to become the host of a new African Regional Office for the HCCH and help to spread the unification of private international law in Africa – a goal of the HCCH in its attempt to be a truly global international institution for private international law. The cost of Nigerian involvement in the HCCH and in implementing all of the 12 Conventions above would be relatively small compared to the potential benefits for Nigeria in attracting and retaining cross-border commercial litigation and in making excellent provision for Nigerian families who move across borders.

Nigeria is blessed with a group of very talented, early-career private international law academics. I personally know three of them who have all completed part of their postgraduate studies in Scotland – one of the authors of this book (Chukwuma Okoli) and Pontian Okoli and Abubakri Yekini. These academics have the potential to help develop and refine Nigerian private international law. This book is a wonderful foundation for Nigerian private international law and these private international law architects, and probably others, have the training and ability to build a strong, elegant and perfectly proportioned building on this firm foundation.

Anyone interested in private international law will be fascinated to read this book. It reveals a Commonwealth system of private international law influenced, but not governed, by English law. It is sophisticated in places (eg the handling of claims made in foreign currency) but in grave need of reform in others (eg recognition and enforcement of foreign judgments). The chapter on succession is particularly fascinating because of its analysis of the conflict of laws between customary laws and other laws based on Christian and Muslim traditions. The interaction between private international law and human rights is examined in this context. Nigeria is part of the Commonwealth scheme on cross-border recovery of maintenance but would benefit enormously in enabling its children to get child support from fathers abroad if it became a party to the Hague Maintenance Convention 2007 which is already in force in Brazil, the EU, UK, USA and others. There is no mechanism in Nigeria for dealing with international child abduction or intercountry adoption and yet becoming a Party to those Hague Conventions would bring Nigeria into regimes both involving co-operation with over 100 other States. Nigeria has rules of court anticipating the existence of Conventions to help with cross-border service of process and taking of evidence abroad and yet those are inoperative because Nigeria is not a party to any such Convention. Becoming a Party to Hague Service (76 Contracting Parties) and Hague Evidence (63 Contracting Parties) would transform the Nigerian scene in terms of these basic building blocks for international litigation. Nigeria could be in the forefront of carving out a modern, successful hub for commercial litigation in Nigeria by being one of the leaders in ratifying the Hague Judgments

Convention 2019 and joining with the EU, Mexico, Singapore and others in being party to Hague Choice of Court 2005.

I highly recommend this book to all lawyers and judges in Nigeria, to all legal academics working on private international law anywhere, to those responsible for international matters in the Nigerian Federal Government and those responsible for justice in all the States of the Nigerian Federation. I firmly believe that there is a great opportunity for Nigeria to lead in sustainable development in Africa by championing high quality standards of global justice. A top-quality framework for the operation of the rule of law in cross-border matters necessitates harmonised rules of private international law. Nigeria can see what has been achieved already in Nigerian private international law through studying this book. However, it will also quickly see the opportunity for becoming the leader in Africa and one of the global leaders in cross-border justice if it invests the time and energy needed to radically improve its private international law by active membership of the HCCH and ratifying and acceding to its key Conventions.

Paul Beaumont,
Professor of Private International Law,
University of Stirling

PREFACE

This book examines the rules, principles, and doctrines in Nigerian law for resolving cases involving cross-border issues. It is the first book-length treatise devoted to the full spectrum of private international law issues in Nigeria. As a result of increased international business transactions, trade, and investment with Nigeria, such cross-border issues are more prevalent than ever. The book provides an overview of the relevant body of Nigerian law, with comparative perspectives from other legal systems. Drawing on over 500 Nigerian cases, relevant statutes, and academic commentaries, this book examines jurisdiction in inter-State and international disputes, choice of law, the enforcement of foreign judgments and international arbitral awards, domestic remedies affecting foreign proceedings, and international judicial assistance in the service of legal processes and taking of evidence.

The principal objectives of the book are to provide a comprehensive and authoritative statement on the rules, principles, and doctrines in Nigerian law for resolving cases involving cross-border issues, and to make these more accessible, both in Nigeria and beyond. We have endeavoured to state the law as it was in September 2019. We have sought to document and inform, as well as critique various aspects of Nigerian private international law. We have identified various areas of the law in need of reform and provided legislators and judges with comparative materials for such an exercise.

Given the difficulty of accessing Nigerian cases, especially from outside the country, we have provided comprehensive accounts of most of the cases examined in this book. We hope readers will find this useful. Also, in many instances, we have named the judges who made specific observations and, consistently with the professional courtesies accorded judges in Nigeria, acknowledged their status in the judiciary, including subsequent elevation on the judicial ladder with the customary 'as he/she then was'.

This book is the product of years of wrestling with issues of private international law in Nigeria, including visits to numerous libraries and websites to secure the over 500 Nigerian cases that are examined in this book. We acknowledge the support of all the people who made accessible to us the cases examined in this book or supported us in various ways to make this work possible.

I, Dr Okoli, would like to thank my lovely wife, Uchechi Chiazokam Okoli (*nee* Ibekwe) for her loyalty and support. I am indebted to my family – Professor (Dr) Chukwuma Simon Okoli, Mrs Felicia Nwakaego Okoli, Dr Chukwuemeka Joshua Okoli, and Mr Ifeanyi Chukwudi Okoli for their support. I am also grateful to the fantastic mentorship I received from *Mazi* Solomon Mbadiwe, while I practised as a rookie lawyer in Nigeria. My research was supported by

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I, Dr Oppong, would like to express gratitude for the support provided by my wife, Joyce Okofo Adjei, and my beautiful daughters Emerald Mary Adjei, Zoe Serwaa Oppong, and Elizabeth Asantewaa Oppong. I acknowledge the excellent research assistance provided by Mr Zi Chang (Cory) Song, JD student at Thompson Rivers University Faculty of Law, and Mr Sam Tecle, Associate at Gowling WLG, Vancouver. My research was supported by the Social Sciences and Humanities Research Council of Canada.

Finally, we are grateful to Professor Paul Beaumont, the General Editor of Hart Publishing's *Studies in Private International Law* for including this book in the prestigious series. We also thank the staff at Hart Publishing for their work in making this book ready and accessible to the world.

Dr Chukwuma Samuel Adesina Okoli
Dr Richard Frimpong Oppong, FGA
1 October 2019

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ABBREVIATIONS

AC	Appeal Cases
ALR Comm	African Law Reports, Commercial Series
All FWLR	All Federation Weekly Law Reports
All ER	All England Reports
All NLR	All Nigerian Law Reports
Cap	*Capitulus* (Chapter)
BLLR	Butterworths Labour Law Reports (South Africa)
Bus LR	Business Law Reports
Ch D	Chancery Division
CLC	CCH Commercial Law Cases
CLRN	Commercial Law Reports of Nigeria
ECSLR	East Central State Law Reports
ECSNLR	East Central State Nigerian Law Reports
ENLR	Eastern Region of Nigerian Law Reports
FHCLR	Federal High Court Law Reports
FNLR	Federation of Nigeria Law Reports
FSC	Federal Supreme Court
FSCC	Federal Supreme Court Cases
FWLR	Federation Weekly Law Reports
GLR	Ghana Law Reports
IESC	Irish Supreme Court
ILR	International Law Reports
KLR	Kenya Law Reports
LFN	Laws of the Federation of Nigeria

Lloyd's Rep	Lloyd's Law Reports
LLR	Lagos Law Reports
LPELR	Law Pavilion Electronic Law Reports
LR HL Sc	Law Reports, House of Lords Scotch and Divorce Appeal Cases
NCLR	Nigerian Constitutional Law Reports
NLR	Nigerian Law Reports
NMLR	Nigerian Monthly Law Reports
NNLR	Northern Nigerian Law Reports
NSC	Nigerian Supreme Court
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Reports
QLRN	Quarterly Law Reports of Nigeria
SC	Supreme Court
SCM	Supreme Court Monthly
SCNJ	Supreme Court of Nigeria Judgments
SCNLR	Supreme Court of Nigeria Law Reports
TLR	Tanzanian Law Reports
UKSC	UK Supreme Court
WACA	West African Court of Appeal
WBRN	Western Bar Reports of Nigeria
WRN	Weekly Reports of Nigeria
WRNLR	Western Region of Nigeria Law Reports

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PART I

Preliminary Matters

1

Introduction

Nigeria is a federal country consisting of 36 States[1] and the Federal Capital Territory, Abuja.[2] With increased cross-border transactions and investments, the significance of private international law (or conflict of laws)[3] – the body of law that aims to resolve claims involving foreign elements – has become more accentuated than ever. Indeed, private international law rules have sometimes been invoked in resolving disputes with inter-State dimensions within the Federation, especially on jurisdiction and choice of law matters.[4] Conflict of laws has also been used to resolve disputes involving internal conflicts between various customary laws and between customary laws and the Nigerian Constitution or enabling statutes, especially in the area of family law.[5]

Nigerian courts have embraced the important role of private international law in resolving disputes with foreign elements. In the words of Tobi JCA (as he then was):

> The basic aim of private international law is to resolve conflicts of municipal or domestic laws at the international law. It is good law that all sovereign nations zealously guide and guard their sovereign status or sovereignty in international law. But because no country can operate in isolation or an island of its own, international diplomacy and international trade and commerce necessitates the formulation of rules of private international law, to resolve any conflict in the different municipal laws.[6]

Unfortunately, to date, there is no comprehensive treatise on private international law in Nigeria.[7] This book aims to fill that academic void: drawing on

[1] Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. See s 3 of the Constitution of the Federal Republic of Nigeria, 1999.

[2] See Constitution of the Federal Republic of Nigeria, 1999 ss 2 and 3.

[3] 'Private International Law' and 'Conflict of Laws' are used interchangeably in this book, as they are intended to have the same meaning.

[4] In *Barzasi v Visinoni Ltd* (1973) NCLR 373, 377, Wheeler J observed that 'Now Nigeria having a federal form of constitution with separate High Courts for each state, it would seem to me on principle that this question of jurisdiction of the various State High Courts, in the absence of legislation on the point, is governed by the rules of the common law on the position in private international law'. See also *Swissair v African Continental Bank Ltd* (1971) NCLR 213, 225 (Lewis JSC).

[5] This kind of conflict is properly categorised as 'internal conflict of laws'.

[6] *Nahman v Wolowicz* (1993) 3 NWLR 443, 459.

[7] *Cf* IO Agbede, *Themes on Conflict of Laws* (Ibadan, Shaneson, 1989); IO Omoruyi, *An Introduction to Private International Law: Nigerian Perspectives* (Benin City, Ambik Press Ltd, 2005); HA Olaniyan,

over 500 Nigerian cases as well as statutes, and academic commentary, this book examines mainly jurisdiction (in inter-State and international disputes), choice of law, and the recognition and enforcement of foreign judgments and international arbitral awards. This introduction briefly examines the sources of Nigerian private international law and its history. It also provides the reader with a map of how this book is organised.

Regarding private international law, the sources of law in Nigeria are mainly case law, and to a lesser extent legislation and international treaties that have been implemented in Nigerian law. Though the Constitution of the Federal Republic of Nigeria, 1999 is supreme throughout Nigeria,[8] it does not expressly indicate whether legislation on private international law matters is within the exclusive competence of the federal government or the States. However, the nature of matters constitutionally assigned to the exclusive competence of the federal government suggests that private international law legislation is more likely to emanate from the federal level. To date, there have been only a few such laws, especially to the extent that they address conflict of laws issues in a comprehensive way. Furthermore, the existing statutes address mainly issues of jurisdiction in international matters and enforcement of foreign judgments and arbitral awards. It is, however, not uncommon to find private international law related provisions embodied in legislation dealing with various issues.

Case law plays an important role in Nigerian private international law. Accordingly, this book is foregrounded in Nigerian cases. The judiciary in Nigeria is structured as follows: the Federal Courts are the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja; the Sharia Court of Appeal of the Federal Capital Territory, Abuja, and the Customary Court of Appeal of the Federal Capital Territory, Abuja.[9] At the State level, there is a High Court, Sharia Court of Appeal and Customary Court of Appeal of each State.[10] Because of the nature of their subject matter jurisdiction, private international law cases are unlikely to emanate from the Sharia and Customary courts.[11] Accordingly, this book focuses on the jurisprudence of the Federal and State High Courts as well as the Supreme Court of Nigeria and the Court of Appeal of Nigeria. We focus especially on the jurisprudence of the Supreme Court and the Court of Appeal because of the precedential force of their jurisprudence.[12]

Foreign case law often serves as an important source of persuasive authority because of the relatively underdeveloped nature of Nigerian private international

Jurisdiction of Nigerian Courts in Causes with Foreign Elements (Lagos, Lagos University Press, 2013). These books are largely inaccessible outside Nigeria.

[8] Constitution of the Federal Republic of Nigeria, 1999 s 1.

[9] ibid, ss 230–269.

[10] ibid, ss 270–284.

[11] However, internal conflict of law cases might arise in such courts.

[12] In addition, the decisions of the High Court and Federal High Court in Nigeria are generally unreported, and in cases where they are reported, they are largely inaccessible outside Nigeria.

law. In this regard, the jurisprudence of the English courts is particularly persuasive and is often referred to by Nigerian courts. Nigerian courts have, however, cautioned against over-reliance on English cases. Tobi JCA put it with characteristic flamboyance when he once observed:

> English is English. Nigerian is Nigerian. The English are English. So also the Nigerian are Nigerians. Theirs are theirs. Ours are ours. Theirs are not ours. Ours are not theirs. We cannot therefore continue to 'enjoy' this 'borrowing spree' or 'merry frolic' at the detriment of our legal system. We cannot continue to pay loyalty to our colonial past with such servility or servitude. After all, we are no more in slavery.[13]

The Supreme Court was less dismissive of foreign cases, and in rejecting and reprimanding the approach of Tobi JCA, has held that there is nothing wrong with borrowing from another legal system.[14] We follow the perceptive stance of the Supreme Court. Accordingly, although this book is foregrounded in Nigerian case law, we have drawn on foreign cases, especially English cases, in areas where we think the law is in need of reforms or there are gaps to be filled.[15]

Doctrinal writings are not a source of Nigerian law and lack binding legal force. However, they can influence judicial decisions or serve as the basis of legislative reform. Although there are no academic journals in Nigeria specifically dedicated to private international law issues, the volume of private international law scholarship is growing.

With the exception of one notable scholarly work,[16] jurists have largely neglected the history of Nigerian private international law. Their discussion of the subject often starts from the date when English law was received into Nigeria.[17] No serious inquiry has been made into the position before this period. Nigerian writers seem to content themselves with an *a priori* conclusion that the Nigerian pre-colonial legal regime did not have private international law rules and, by extension, such problems, but this is not entirely accurate. This is because the socio-economic intercourse among people of diverse backgrounds and diversity of legal regimes – two factors that lay the foundation for conflict of laws problems – were present in pre-colonial Nigeria.[18]

[13] Cited by the Supreme Court of Nigeria in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11.

[14] *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11 (Ayoola JSC, Mohammed JSC (as he then was), Ejiwunmi JSC).

[15] See AO Obilade, *The Nigerian Legal System* (London, Sweet & Maxwell, 1979) 4, where he noted: 'One of the most notable characteristics of the Nigerian legal system is the tremendous influence of English law upon its growth. The historical link of the country with England has left a seemingly indelible mark upon the system. English law forms a substantial part of Nigerian law'.

[16] RN Nwabueze, *The History and Sources of Conflict of Laws in Nigeria: With Comparisons to Canada* (Germany, VDM Verlag, 2009) 28.

[17] The British Administration introduced English law into the Colony with effect from 4 March 1863. The first Supreme Court of the Colony was established in 1863 by the Supreme Court Ordinance 1863.

[18] RN Nwabueze, *The History and Sources of Conflict of Laws in Nigeria: With Comparisons to Canada* (Germany, VDM Verlag, 2009) 28.

The kingdoms and tribes that existed in pre-colonial Nigeria had commercial and inter-personal relations with each other and, indeed, with the outside world. As Obilade wrote:

> Before the nineteenth century, British and other foreign merchants had started trade with the indigenous people on the coast of West Africa. The trading coastal areas which later formed part of Nigeria included Lagos, Benin, Bonny, Brass, New Calabar (now Degema) and Old Calabar (now Calabar). Attempts were made by the indigenous courts in those areas to settle trading disputes between foreigners and indigenous people. But the customary court system was very strange to the British and other foreign traders. Moreover, although the British traders were aware of the existence, in England, of the common law, a type of unwritten law, that law was, and still is, different in material respects from customary law. It was generally believed by those litigants that they seldom obtained justice in the courts.[19]

While such relations could potentially have formed the basis of significant private international law problems there does not appear to have developed a systematic body of rules, at least not as we know it today, to resolve such problems. The common application of Islamic law in Northern Nigeria from about the eleventh century onwards left little room for choice of law problems.[20] Another factor reducing the scope for private international law problems was the barter system of trading, which left little room for substantial disputes requiring choice of law considerations.[21] In general, one can speculate that disputes were generally settled on the basis of local law, ie the *lex fori*.[22]

The influx of Europeans into Nigeria – ultimately culminating in the United Kingdom as the colonial power – gave rise to disputes with private international law dimensions. Such disputes were initially settled through force or diplomacy and, with time, a judicial mechanism was developed for resolving such disputes. The judicial systems introduced in various parts of Nigeria after 1854 entertained problems of private international law dimensions, but this did not lead to the introduction of a full-blown private international law regime. This is because the courts did not decide disputes before them on the basis of choice of law. Furthermore, perhaps more importantly, at this time English private international law was still in its infancy and it was unlikely that the resolution of disputes in the colonies would have been steeped in private international law analysis.

In general, it can be said that the reception of English law – the common law, doctrines of equity and statutes of general application – into the colony of Lagos in 1863 and the rest of Nigeria in 1900 marked the introduction of private international law, as we know it today, into the Nigerian legal system. For example, in 1908 the Foreign Judgment Extension Ordinance was enacted in both Northern

[19] AO Obilade, *The Nigerian Legal System* (London, Sweet & Maxwell, 1979) 18.
[20] RN Nwabueze, *The History and Sources of Conflict of Laws in Nigeria: With Comparisons to Canada* (Germany, VDM Verlag, 2009) 30.
[21] ibid, 30.
[22] ibid, 33–34.

and Southern Nigeria, and in 1900 a court grappled with the issue of recognition of a Brazilian marriage between two Nigerians who had been sent to Brazil as slaves.[23] As is evident from this book, a significant body of case law and modest legislation has emerged, especially since the country became independent on 1 October 1960.

This book is mainly organised around the three main traditional branches of private international law, namely jurisdiction in international matters, choice of law, and the recognition and enforcement of foreign judgments and arbitral awards. It also examines remedies that affect foreign judicial proceedings such as anti-suit injunctions, and international judicial assistance to serve legal process and take evidence.

[23] *Onikepe v Goncallo* (1900) 1 NLR 41. See also Chapter 12 'Family' in this volume.

2

Conceptual Issues in Choice of Law

I. Introduction

Conceptual issues in choice of law[1] are preliminary matters that arise prior to determining the applicable law. Matters relating to conceptual issues in choice of law constitute one of the most intricate aspects of private international law, yet, they hardly ever arise in practice or they go undetected by counsel and judges; these matters are regarded principally as a domain for academics. Conceptual issues in choice of law usually involve subjects such as characterisation, procedure and substance, *renvoi*, and the 'incidental' question. In Nigeria there is little to no case law that engages with these issues.

II. Characterisation

Characterisation is a thorny area of private international law. Once a court has assumed jurisdiction in a matter containing foreign elements, the court must resolve the issue of characterisation. Forsyth, a leading authority in South African private international law, submits that

> characterisation is the most fundamental and difficult problem of the conflict of laws. But sound analysis of even the most difficult case will … allow an approach to be adopted which, although not perfect, may be practical as well as theoretically coherent.[2]

[1] For instructive academic literature on this subject see generally C Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) *Law Quarterly Review* 141; A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 *International and Comparative Law Quarterly* 877; JM Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 *International and Comparative Law Quarterly* 691; G Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69; C Forsyth, '"Mind the Gap": A Practical Example of Characterisation of Prescription/Limitation Rules' (2006) 2 *Journal of Private International Law* 169; C Forsyth, '"Mind the Gap Part II": The South African Supreme Court of Appeal and Characterisation' (2006) 2 *Journal of Private International Law* 425; JR Mortensen, '"Troublesome and Obscure": The Renewal of *Renvoi* in Australia' (2006) 2 *Journal of Private International Law* 1; C Schulze, 'Formalistic and Discretionary Approaches to Characterisation in Private International Law' (2006) 123 *South African Law Journal* 161; A Scott, 'Substance and Procedure and Choice of Law in Torts' (2007) *Lloyd's Maritime and Commercial Law Quarterly* 44.

[2] C Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) 114 *Law Quarterly Review* 141.

Forsyth also argues that if common law lawyers and judges are equipped with the tools to characterise issues in private international law, less time and costs will be expended on cross-border adjudication.[3] Conversely, Forsyth submits that if common law lawyers and judges *lack* the theoretical and analytical tools to characterise issues, considerable time and costs will be expended on cross-border adjudication.[4]

There are five different approaches to characterisation – *lex fori*, *lex causae*, *enlightened lex fori*, *via media*, and culmination. The *lex causae* approach applies the governing law to characterise. The *enlightened lex fori* approach was formulated by Khan-Freund[5] who argued that: the *lex fori* should develop principles of characterisation specifically for use in conflict cases, which differ from those used in purely internal cases. Such special principles of classification would be 'enlightened' and would take into account the classifications used in foreign legal systems as well as the desirability of gradually moving towards a single set of internationally accepted concepts.[6]

The *via media* approach was formulated by Falconbridge.[7] The *via media* approach

> begins with the characterisation of all potentially applicable rules by the legal systems from which they come but which then uses the *lex fori* to determine whether the concrete legal question raised by characterising by the *lex causae* may be subsumed within the *lex fori's* conflict rule.[8]

Also, Forsyth submits that:

> In the South African context it works as follows: first, the relevant rules of the *lex fori* are characterised according to the *lex fori*; and then, secondly, the relevant rules of the *lex causae* are characterised according to the *lex causae*. It may be that by the end of this process it is clear that only one of the potentially applicable rules, so characterised, claims applicability. For instance, if the *lex causae*'s rule is characterised by the *lex causae* as procedural (and so is not applicable), while the *lex fori*'s rule is characterised by the *lex fori* as procedural (and so is applicable), then it seems straightforward to apply the *lex fori*'s rule. But if either 'gap' or its cousin 'culmination' – where more than one rule is applicable – arises or the solution is otherwise unsatisfactory, then the third stage of the *via media* becomes vital.[9]

On the issue of culmination, Forsyth states that '[i]f the *lex fori* characterises its prescription rules as procedural and the *lex causae* characterises its

[3] ibid, 160–61.
[4] ibid, 141.
[5] O Kahn-Freund, *General Principles of Private International Law* (Leyden, Sijthoff, 1976).
[6] C Forsyth, '"Mind the Gap": A Practical Example of the Characterisation of the Prescription/Limitation' (2006) 2 *Journal of Private International Law* 169, 173.
[7] JD Falconbridge, 'Conflict Rule and Characterization of Question' (Parts 1 & 2) (1952) 30(2) *Canadian Bar Review* 103, 106ff; (1952) 30(3) *Canadian Bar Review* 265ff.
[8] C Forsyth, '"Mind the Gap": A Practical Example of the Characterisation of the Prescription/Limitation' (2006) 2 *Journal of Private International Law* 169, 173.
[9] C Forsyth, '"Mind the Gap Part II": The South African Supreme Court of Appeal and Characterisation' (2006) 2 *Journal of Private International Law* 425, 428.

prescription rules as substantive, then it appears both (presumably conflicting) rules are applicable!'[10]

Although the above approaches are helpful, it is recommended that a Nigerian court must apply the principles of Nigerian law – the *lex fori* – in order to determine the juridical nature of the question it is confronted with. However, because the dispute is one involving a foreign element, a Nigerian court must be prepared to adopt an internationalist approach. In other words, it must be prepared to take into account the accepted rules and institutions of foreign legal systems. The court should not rigidly confine itself to the established categories of Nigerian law, since that would mean disregarding foreign concepts merely because they are unknown to Nigerian law. That would be inconsistent with the underlying ethos of private international law. Thus, domestic concepts such as contract, tort, property, and trust may have to be given a wide meaning in order to embrace analogous legal relationships of a foreign type. Similarly, where a legal institution is unknown to the court or known to it under a different designation or with different content, a Nigerian court must take foreign law into account in characterising that institution.

III. Substance and Procedure

The distinction between substance and procedure in private international law methodology is significant. An issue or subject matter must be classified as either substantive or procedural before the law that governs the particular issue or subject matter can be determined. This distinction assumes a central stage in the choice of law process. The characterisation of an issue as substantive or procedural takes the forum one step closer to identifying the governing law.[11]

The Australian High Court highlighted the practical distinction between substance and procedure when it held that:

> [t]wo guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum … should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum …
>
> These principles may require further elucidation in subsequent decisions, but it should be noted that giving effect to them has significant consequences for the kinds of case in which the distinction between substance and procedure has previously been applied.[12]

[10] ibid, 429.

[11] JM Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 *International and Comparative Law Quarterly* 691.

[12] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99]–[100].

Determining what issues are substantive and what are procedural is controversial in the common law world. Common lawyers give the widest possible extension to the meaning of the term 'procedure'. The expression generally includes all legal remedies, and everything connected with the enforcement of a right. The essence of what is procedural may also be found in rules which govern or regulate the mode of conduct of court proceedings.[13] Substance can be defined as matters that affect the existence, extent, and enforceability of the rights or duties of the parties to an action.[14]

In Nigeria, matters relating to procedure are governed by the *lex fori*, while matters relating to substance are governed by the *lex causae.*[15] The characterisation of an issue as substantive or procedural is governed by the *lex fori*. Nigerian courts apply their own procedural rules, even to cases involving a foreign element, for policy and pragmatic reasons.[16] This approach also saves the parties the costs of proving foreign rules of procedure. A Nigerian court will apply the *lex causae* to the substance of the dispute. The *lex causae* is not necessarily foreign law. For example, if a contract is governed by Nigerian law, the *lex fori* and *lex causae* will be the same.

In the face of the paucity of Nigerian case law in this area, it is recommended that when the issue comes up for determination, Nigerian courts should recognise that the line between substance and procedure should not be drawn in the same place for all purposes. It should be drawn in the light of the relevant circumstances. Also, the decision as to whether a rule of law is substantive or procedural should be informed by practical and policy considerations. Such decisions should also be guided by precedent and comparative jurisprudence from other common law jurisdictions.[17]

[13] *McKain v Miller* (1991) 174 CLR 1, 27 (Mason CJ).

[14] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [100] (High Court of Australia).

[15] *Resolution Trust Corporation v FOB Investment & Property Ltd* (2001) 6 NWLR 246, 260 (Chukwuma-Eneh JCA, as he then was). See also *The Swiss Air Transport Company Ltd v African Continental Bank* (1971) LPELR-3231 (SC) (Lewis JSC) 13, where it was held that 'the law of evidence and procedure are governed by the *lex fori*'.

[16] The Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022, 1067 (La Forest J) stated that the rationale for applying *lex fori* to matters of procedure is that 'the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court … They aid the forum court to "administer [its] machinery as distinguished from its product" *(Poyser v Minors* (1881), 7 Q.B.D. 329 at p. 333 *per* Lush L.J.).' See also the decision of the High Court of Australia in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99]–[102], Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [133], Kirby J at [192]–[199], Callinan J.

[17] See eg *Tolofson v Jensen* [1994] 3 SCR 1022 (in which the Canadian Supreme Court has characterised statute of limitations as substantive and rejected the common law distinctions between statutes which bar the right to action and those that bar the remedy). *Cox v Ergo Versicherung AG* [2014] UKSC 22 (on the principle that at common law the kinds of damage recoverable is a question of substance, whereas their quantification or assessment went to the availability and extent of the remedy and as such are questions of procedure for the law of the forum).

IV. *Renvoi*

Renvoi is an exciting academic topic. It has been observed elsewhere that '*renvoi* hardly ever arises in practice and is a subject loved by academics, hated by students (because the questions are notoriously difficult and have no answer or no right answer) and ignored, when noticed, by lawyers and judges.'[18]

Renvoi is originally a French word that means 'sending back' or 'reference back.' *Renvoi* arises from uncertainty in the meaning of 'the law' of *lex causae*, ie the governing or applicable law. Once it is decided that a Nigerian court has jurisdiction, the issue before the court is characterised in terms of private international law and the applicable choice of law; the court then simply applies the applicable law. Indeed, if the chosen law is Nigerian law, the judge gives effect to Nigerian law – no additional private international law questions arise.

The situation may be more complex if the applicable law is that of a foreign country. The complexity is generated by the question of what is meant by 'law'. If, for example, the choice of law rule leads the Nigerian court to the law of Italy, what is meant by the 'law of Italy'? Is the law of Italy a reference to the internal law of Italy or the internal law of Italy plus Italy's private international law rules?

The following example illustrates the problem. Adam, a Nigerian national, dies intestate while domiciled in Italy. The Nigerian court must decide how Adam's movables are to be distributed. Under Nigerian law, the question of intestate succession to movables is governed by the law of the domicile of the deceased. In this case, that is the law of Italy. But under Italian private international law, the question of intestate succession to movables is governed by the law of the nationality of the deceased.

From the above example, it becomes clear that if the reference to the law of Italy is a reference to Italian law *including* its private international law rules, then there is a problem. Under Nigerian law, the issue of intestate succession is governed by the law of the deceased's domicile – Italian law. Under Italian law, the issue of intestate succession is governed by the law of the nationality – Nigerian law.

The question then becomes whether the Nigerian court should accept the reference back to Nigerian law and apply Nigerian substantive law on intestate succession, or follow its private international law rules and refer the matter back to Italian law – which will certainly refer the matter back to Nigerian law. How does the court resolve this difficult and potentially unending cycle of references? This is the domain of the *renvoi* problem.

In the above example, only two legal systems are concerned – there is a reference from country A to country B and another reference from country B to country A. This is often referred to as *remission*. There may, however, be cases

[18] *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206; (2004) WASCA 60, [26] *per* Justice Carmel McLure quoting from M Davies, S Ricketson and G Lindell, *Conflict of Laws Commentary and Materials* (Melbourne, Butterworths, 1997) [7.31].

involving three countries: where the reference is from country A to country B, and from country B to country C. This is known as *transmission*. For example, John, an Italian national, dies while domiciled in France with movables in Nigeria. Under Nigerian law, succession to John's movables is governed by the law of his domicile, which is France, but under French law, succession to his movables is governed by the law of his nationality, which is Italian law.

From the above, it should become obvious that problems of *renvoi* have their root in differences in the choice of law rules operating in different countries. In other words, the source of *renvoi* is diversity in choice of law rules. If, in the above examples, both Italy and Nigeria adhere to the principle that the question of intestate succession to movables is governed by the law of the domicile of the deceased, there would *potentially* be no problem. We say potentially because there may be some differences in how that connecting factor is understood or interpreted.

There are three possible solutions to the *renvoi* problem. First, the Nigerian court, which is faced with this issue and who is referred by Nigerian private international law to, for instance, the law of Italy, may take the 'law of Italy' to mean the internal law of Italy, *excluding* Italy's private international law rules. This is known as the 'no *renvoi*' or 'rejection of *renvoi*' approach. This approach is endorsed in a number of recent English cases[19] and expressly applied in European Union private international law for choice of law in civil and commercial matters. Thus, Article 20 of the Rome I Regulation[20] and Article 24 of the Rome II Regulation[21] governing contracts and torts, respectively, explicitly provide that '[t]he application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.'

Second, the Nigerian court may decide the case on the assumption that Nigerian law recognises the doctrine of *single renvoi* (which involves accepting the reference back to Nigerian law and applying the internal law of Nigeria, excluding Nigerian private international law). The doctrine of single *renvoi* is applied in many civil law European countries. The doctrine is called 'single *renvoi*' because it only requires proof of the foreign choice of law rules, but not the foreign choice of law rules on *renvoi*.

Third, the Nigerian court may take the 'law of Italy' to mean the law which an Italian judge would administer if he or she were seised of the matter. Though we refer to this doctrine as 'double *renvoi*', it is also known as the 'foreign court theory' or 'total *renvoi*'. The reason behind the name 'double *renvoi*' is that a court applies the law of the forum's choice of law rules and foreign choice of law rules simultaneously to resolve the dispute in accordance with the approach which would have

[19] See eg *Iran v Berend* [2007] EWHC 132; *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631.

[20] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6.

[21] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations [2007] OJ L199/40.

been taken by a court of the foreign law area exercising jurisdiction over the same case. 'Double *renvoi*' is also known as the 'foreign court theory' because it:

> defers to the foreign court's method of resolving a conflict of conflicts rules, on the assumption that the foreign court would assume jurisdiction and that the foreign court has a declared position on renvoi. It also assumes that it is possible to resolve a case in the same manner as a foreign court would have it decided.[22]

An English court framed the foreign court theory in the following manner: '[T]he court, sitting here to determine [the validity or disposition under a will and some codicils] must consider itself as sitting in Belgium under the particular circumstances of the case.'[23] In effect, the court applies 'foreign conflict rules in exactly the same manner as, in their opinion, the foreign court would have done.'[24]

'Double *renvoi*' is also known as 'total *renvoi*' because the court applies the whole of the foreign choice of law rules, including its rules on *renvoi*. 'Double *renvoi*' was applied by the High Court of Australia in the famous case of *Neilson v Overseas Projects Corporation of Victoria Ltd*.[25] In that case the issue was the liability in tort of an Australian company for injuries sustained in China by an Australian woman domiciled in Western Australia and married to one of the company's employees. The Chinese limitation period had expired, while the Western Australian limitation period had not.

For background, an Australian national that lived in the People's Republic of China was injured in a fall in an apartment provided by an Australian company. The apartment was provided to her under arrangements made in Australia. More than five years after the accident, the Australian national sued the Australian company for negligence in the Supreme Court of Western Australia. Her statement of claim did not refer to Chinese law. The company relied on an English translation of the General Principles of Civil Law of the People's Republic of China and expert evidence concerning the meaning and effect of certain provisions of those Principles, namely, Article 146, to argue that the claim was statute-barred after one year. Article 146 of the General Principles, as translated, provided:

> [w]ith regard to compensation for damages resulting from an infringement of rights, the law of the place in which the infringement occurred shall be applied.
>
> If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied.

On appeal from the Supreme Court of Western Australia the majority of the High Court of Australia held that the trial judge, in applying the second sentence of Article 146 of the General Principles, was bound to conclude that Chinese law,

[22] A Lu, 'Ignored no More: Renvoi and International Torts Litigated in Australia' (2005) 1 *Journal of Private International Law* 35, 38.
[23] *Collier v Rivaz* (1841) 163 ER 608, 609.
[24] *In re Annesley* [1926] Ch 692, 705.
[25] [2005] HCA 54.

when applied to the facts, would look to Australian law, including Australian limitation periods, to determine the parties' rights and obligations.

An additional way in which *renvoi* may be applied is in the internal conflict of laws situation. Thus, the Supreme Court of Nigeria once held that 'the *lex situs* governs the immovable property of a deceased intestate, and the *lex situs* means the law of Nigeria which embraces customary law including the conflict rules between two systems of customary law.'[26]

Renvoi has advantages and disadvantages that we will address and examine in order to suggest what course the Nigerian courts should take in the future when applying the *renvoi* doctrine. *Renvoi* has three key advantages. First, it advances uniformity of decisions and discourages forum shopping.[27] The governing law, or *lex causae*, would be applied in the same way as the law of the forum, which is Nigerian law in this case, whether or not the law of the forum was the same as that of the governing law.[28] If the Nigerian court would give a plaintiff only what an Italian court would give, the incentive to forum shop might be reduced; if a Nigerian court would do something different from what an Italian judge would do, the incentive to forum shop might increase.[29] In effect, parties should not be able to obtain advantages in the Nigerian forum which are not available in the place of the governing law. Second, it leads to certainty and simplicity rather than complexity and difficulty, since the Nigerian forum should assume that the governing law's legal system is one constituted by an interdependent rule.[30] Third, it enables the Nigerian forum court to determine, as an element of the *lex fori*, the source and content of rules governing the rights and obligations of parties to a particular dispute.[31]

Renvoi, however, has several disadvantages that outweigh its supposed advantages, especially from a pragmatic point of view. First, correctly applying *renvoi* in practice is an onerous task,[32] and Nigerian practitioners and decision-makers might be hostile to it. The topic is even a difficult academic subject, though intellectually stimulating for scholars. Second, by deferring to the choice of law rule of another country, the Nigerian court undermines its own choice of law rule and the policy it represents.[33] Third,

> it is also suggested that it can operate as a result-seeking rather than a rule-seeking process. This may be particularly so if its application depends upon the policy objectives of the relevant foreign system under consideration in a particular case.[34]

[26] *Zaidan v Mohssen* (1973) 1 All NLR 86, 100.

[27] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 at [87]; *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 at [174] (Beatson J).

[28] S Rares, 'Maritime Liens *renvoi* and Conflict of Laws: The Far from *Halcyon Isle*' [2014] 2 *Lloyd's Maritime and Commercial Law Quarterly* 183, 198.

[29] A Briggs, 'In Praise and Defence of *Renvoi*' (1998) 47 *International and Comparative Law Quarterly* 877, 879.

[30] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, [92], [94].

[31] ibid, [96].

[32] *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631, [161] (Beatson J citing others).

[33] ibid, [175].

[34] ibid, [175].

Fourth:

> the doctrine does not in fact ensure uniformity and will do so only if *renvoi* is recognised in one of the countries concerned but either rejected in the other or forsworn by the *lex fori*, or where the issue is one the *lex fori* characterises as procedural and thus for it to determine even where the foreign applicable law characterises it as substantive.[35]

Fifth, as a national court often faces challenges in applying its own laws, a national court's requirement to apply foreign law is a particularly complicated exercise.[36] Thus, an English judge (Beatson J) observed that:

> The facts of Neilson's case illustrate these difficulties. A majority … held there was insufficient evidence as to the circumstances in which a Chinese court would exercise its discretion to apply Chinese law in the case of a tort involving foreign nationals or domiciliaries and applied the presumption that foreign law is the same as the law of the forum.[37]

Sixth, *renvoi* could lead the Nigerian court to move forward and backwards in a never-ending cycle. As a judge of the High Court of Australia (McHugh J) observed in a dissenting judgment:

> The doctrine of *renvoi* is infamous for infinitely requiring the forum court to apply the choice of law rules, but to no end. The problem of the 'infinite regression' arises when: '(a) the choice of law rule of the *lex fori* makes the *lex causae* the applicable law; (b) the choice of law rule of the *lex causae*, as proved or presumed makes the *lex fori* the applicable law and (c) the *lex fori* has a doctrine of total *renvoi*.'
>
> When these circumstances arise, the forum's choice of law rule requires the forum court to apply the choice of law rules of the *lex causae*. And those choice of law rules of the *lex causae* require the forum court to apply the choice of law rules of the *lex fori*. And so 'applicable law' goes back and forth on an endless journey. The result is that it is impossible to identify which law resolves the issue that is in dispute.[38]

In view of the many disadvantages of *renvoi*, some judges have held that it should be applied on a case-by-case basis.[39] Indeed, some scholars submit metaphorically that *renvoi* should be applied as a balanced dosage.[40]

[35] ibid, [176].
[36] ibid, [177]–[179].
[37] ibid, [180].
[38] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 at [41] (McHugh J) (footnote omitted). McHugh J at paragraph 42 further states that '[t]here is only one circumstance where, in proceedings in which choice of law is an issue, the forum's acceptance of the total *renvoi* doctrine with respect to a choice of law rule will not cause this "hall of mirrors." That circumstance is when a party tenders evidence that shows, to the requisite standard of proof, that the *lex causae* rejects the doctrine of *renvoi*, or has a doctrine of only single *renvoi*, with respect to the particular choice of law rule.'
[39] *Islamic Republic of Iran v Berend* [2007] EWHC (QB) 132, [20] (Eady J). *Barros Mattos Junior v McDaniels Ltd* [2005] EWHC 1323 (Ch), [108] (Lawrence Collins J).
[40] A Briggs, 'In Praise and Defence of *Renvoi*' (1998) 47 *International and Comparative Law Quarterly* 877, 881.

It is submitted that Nigerian courts should not follow a case-by-case approach as it would lead to a 'very uncertain legal regime'.[41] Rather, Nigerian judges should not apply *renvoi* to commercial matters[42] as 'no sane businessman or his lawyers would choose the application of *renvoi*.'[43] The expectation of the parties that *renvoi* should not apply in civil and commercial matters should be respected by Nigerian judges. *Renvoi* should be reserved for family law matters such as wills, succession, and marriage,[44] if at all.

V. Conclusion

This chapter has discussed the subject of conceptual issues in choice of law, which includes the subject of characterisation, substance and procedure, and *renvoi*. There is scant jurisprudence in respect of these issues in Nigerian jurisprudence. It remains to be seen whether Nigerian courts will be faced with an increasing number of choice of law issues. In the absence of Nigerian cases, a Nigerian court confronted with such issues may benefit from jurisprudence in Commonwealth countries such as the United Kingdom, Australia, and South Africa.

[41] *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Beatson J), [172].

[42] *Macmillan Inc v Bishopgate Investment Trust Plc* [1995] 1 WLR 978, 1008 (Millet J); *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Beatson J); *Amin Rasheed Shipping Corporation Appellants v Kuwait Insurance Co* [1984] AC 50, [61]–[62].

[43] J Fawcett and JM Carruthers, *Cheshire, North and Fawcett, Private International Law*, 14th edn (Oxford, Oxford University Press, 2008) 71.

[44] *WD Fairway* [2009] 2 Lloyd's Rep 191 at [87]–[88] (Tomlinson J).

3

Foreign Law

I. Nature and Proof of Foreign Law

A Russian company enters into a contract with a Nigerian company to ship goods to Nigeria. The contract is governed by Russian law. The Russian company wishes to rely on Russian law to enforce the contract. A person resident in Lagos sues another resident in Kano for an accident that occurred in Lagos. The defendant resident in Kano seeks to rely on the statute of limitation of Lagos in a bid to escape liability. A Ghanaian applies to a Nigerian court for the distribution of assets from the estate of a deceased person whose properties are in Ghana. The respondent contests that, under Ghanaian law, the Nigerian court has no jurisdiction to make such an order. A Chinese bank, on the instruction of a Japanese buyer, issues a letter of credit contract in favour of a Nigerian seller, which is to be confirmed by a Nigerian bank. The Nigerian bank fails to pay against documents produced by the Nigerian seller. The Nigerian seller wishes to rely on the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce (the 'UCP'), which has not been incorporated into the contract.

The above scenarios raise thorny issues of foreign law in civil proceedings in Nigeria.

The nature and proof of foreign law in civil proceedings is a significant aspect of private international law, such that a leading expert on the subject in English conflict of laws described it as 'the crux of conflict of laws'.[1] Parties that seek to rely on foreign law usually do so with the aim of securing an advantage; the difference in potentially applicable laws often leads to conflicting results. A court applies foreign law to enhance the administration of justice in civil proceedings. However, pleading and proving foreign law in civil proceedings can be inconvenient for parties since it extends the duration of cases, creates language barriers, and increases legal costs. Despite its drawbacks, the nature and proof of foreign law can determine a case's outcome and therefore facilitate the settlement of a dispute, especially where one party strategically pleads foreign law and provides the evidence necessary to undermine the opposing party's position. A party that lacks the resources to disprove persuasive foreign law is more likely to settle.[2]

[1] R Fentiman, *Foreign Law in English Courts* (Oxford, Oxford University Press, 1998) 1. See generally S Geeroms, *Foreign Law in Civil Litigation – A Comparative and Functional Analysis* (Oxford, Oxford University Press, 2004).

[2] R Fentiman, *Foreign Law in English Courts* (Oxford, Oxford University Press, 1998) 43–44.

The nature and proof of foreign law in Nigeria raises important issues – what is foreign law? Is foreign law a question of fact, rather than a question of law? Does foreign law include unincorporated international laws and non-state law? Should the laws of sister African common law countries such as Ghana be proved in the same way as, for instance, Russian law? What does it mean to say that judicial notice is taken of the laws of other States in the Federation? Must these laws nonetheless be pleaded like foreign law? What happens when foreign law is not proved to the satisfaction of a judge? Must foreign law be applied when it is satisfactorily proved? Are there grounds for excluding foreign law? This chapter addresses these complex issues.

II. Nature of Foreign Law in Nigeria

The determination of what constitutes foreign law in Nigeria is a matter for the *lex fori* – the law of the forum. In Nigeria, foreign law is a question of fact and is inadmissible by the court until it is pleaded and proved by expert evidence.[3] If a party fails to do so, the court will assume that the law of any foreign country is the same as that of Nigeria.[4] This is also known as the 'presumption of similarity'. In common law methodology, the presumption of similarity may apply 'in three different situations: where foreign law is not relied upon; where it is relied upon but not pleaded and proved; and where it is inadequately proved.'[5]

In *Ogunro v Ogedengbe*,[6] the deceased owned land in Lagos and in Ghana. The applicants took out a summons for directions as to who was entitled to the deceased's estate and for an order of distribution. Counsel for the respondents contended that under Ghanaian law, the Nigerian court had no jurisdiction to deal with property in Ghana. The court gave the respondents' counsel over four weeks to produce evidence of the Ghanaian law of succession; he failed to do so. The Supreme Court of Nigeria held that the trial court correctly found that in the absence of counsel for the respondents providing evidence of the Ghanaian law of succession, Nigerian law was the applicable law in this case as if it was no different from Ghanaian law.

Similarly, in *Resolution Trust Corporation v FOB Investment & Property Ltd*,[7] the first defendant had approached the plaintiff to invest in shares in a bank in the United States. The bank subsequently went bankrupt. The second defendant was appointed as a receiver to liquidate the assets of the bank. The plaintiff took issue with the second defendant's refusal to give the plaintiff powers of acquisition over the bank. The plaintiff sought to serve the defendants out of jurisdiction, and the

[3] Evidence Act, 2011 ss 67–69.
[4] *Ogunro v Ogedengbe* (1960) 5 FSC 137; *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) (3) ALR Comm. 192.
[5] R Fentiman, *Foreign Law in English Courts* (Oxford, Oxford University Press, 1998) 63.
[6] (1960) 5 FSC 137, 138–39.
[7] (2001) 6 NWLR (Pt. 708) 246.

defendants unsuccessfully challenged the plaintiff's application at the High Court on the *forum conveniens* of the Nigerian court to hear the matter. The defendants successfully appealed the High Court's decision. The Court of Appeal considered the second defendant's argument, that the applicable law that governed the alleged investment the plaintiff had in the second defendant's bank was the Financial Institutions Reform Recovery and Enforcement Act of 1989 ('FIRREA') of the United States, which required the fulfilment of certain conditions before actions could be instituted. The second defendant argued that the plaintiff had not complied with FIRREA. The Court of Appeal rejected this part of the second defendant's submission on the basis that foreign law was not proved as a matter of fact, and held that it would treat the FIRREA as if it was no different from Nigerian law.

In *Nigerian AGIP Exploration Ltd v Nigerian National Petroleum Corporation*,[8] the appellant successfully obtained an arbitral award in Nigeria. The first respondent sought to challenge the arbitral award by obtaining an interim injunction from the Federal High Court. The first respondent's argument was that if an interim injunction was not granted, the first respondent could immediately enforce the award in any of the Contracting States to the Convention on the Recognition and Enforcement of Arbitral Awards (the 'New York Convention'). The first respondent was successful at the Federal High Court. The Court of Appeal allowed the appellant's appeal. Tinuade Akomolafe-Wilson JCA, relying on the Supreme Court's decision in *Ogunro* (*supra*), held that 'the onus of proving a foreign law is on the party who asserts that is different from Nigerian law.' In applying the law to the facts of the instant case, Tinuade Akomolafe-Wilson JCA held that:

> [i]n this appeal, since it is the 1st Respondent that is asserting that the arbitral tribunal award when issued may be immediately enforced in any of the contracting states outside Nigeria, it is its duty to bring facts before the court the law of such foreign contracting states that permits ex parte enforcement of an arbitral award without recourse to the parties. Otherwise, the law as correctly stated by the Appellant is that an arbitral award can only be enforced through judicial proceedings.

Simply put, the presumption of similarity means that if a foreign law is not proved, then the law of the forum applies by default. The presumption of similarity, however, is an intellectually dishonest idea. The idea rests on a fiction that, for example, if a party cannot prove the content of Congolese law, Nigerian law is the same as Congolese law – though the countries do not have a similar legal system. Fentiman, a leading authority on the subject, argues that the presumption of similarity 'has always been insecure'[9] and 'rests on a conceptual mistake.'[10] Fentiman also brilliantly opines:

> This is not to say that the existence of such a presumption, although dubious in principle, is always harmful. It may cause little practical difficulty where it merely explains

[8] CA/A/628/2011 (unreported).
[9] R Fentiman, *Foreign Law in English Courts* (Oxford, Oxford University Press, 1998) 147.
[10] ibid, 147.

> why English law applies where foreign law is not introduced at all, or where it has been pleaded and proved but the evidence is inadequate. But this cannot be said where foreign law is relied upon but not proved. One danger in applying the presumption in such a case is that mandatory introduction of foreign law might thus be subverted. A party who is required to introduce foreign law by a mandatory choice of law rule may attempt to employ the presumption to defeat the rule's obligatory character. Another risk is that a plaintiff who relies upon foreign law even when no such duty exists might oppress a defendant by requiring the latter to disprove the presumption. Certainly, there is something potentially unfair not to say irrational, about requiring one party to disprove what the other has not sought to prove.[11]

Kirby J of the Australian Supreme Court has also severely criticised the presumption of similarity. He notes:

> A presumption that a basic rule of the substantive law of England or some other common law country, in default of proof, is the same as the law of Australia is one that might be justified in a particular case. However, the notion that the law of a country so different, with a legal system so distinct, as China is the same as that of Australia is completely unconvincing.
>
> … I regard it as straining even credulity to impose on an Australian court the fiction of presuming that the law of China … is the same as the law in Australia. Or that a written law of China would be interpreted *and applied* by a Chinese court in the same way as an Australian judge would do in construing a similar text.[12]

Indeed, it may be queried why Nigerian law presumes that the law of another country is the same as Nigerian law until such foreign law is proved as a matter of fact. This rationale is also rooted in the fact that a Nigerian judge is more familiar with Nigerian law than with the law of any other legal system. In other words, a Nigerian court applies the *lex fori* on the assumption that it is the same as the unproven foreign law, since it cannot apply unfamiliar law. Scholars have challenged this traditional common law approach as being artificial – suggesting alternative solutions, that in such cases it is best to dismiss the case of the party who seeks the application of unproven foreign law; or apply the law of some other foreign country the court is familiar with, which has a close relationship with the legal system of the law that is sought to be applied (even though the substantive laws of the countries in question are not the same); or apply the applicable choice of law rules, in the absence of a choice of law, in determining the law that is most closely connected to the contract.[13] However, it does not appear that these alternative solutions outweigh the utility of the traditional common law approach, despite its drawbacks, in presuming that unproven foreign law is the same as the *lex fori*;

[11] ibid, 147–48.

[12] *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54 at [203]–[204] Kirby J (dissenting).

[13] See generally E Khan, 'What Happens in a Conflicts Case when the Governing Foreign Law is Not Proved?' (1970) 87 *South African Law Journal* 145; C Wesley, 'The Presumption the Foreign Law is the Same as Local Law: An Absolute Tradition Revised' (1996) 37 *Codicillus* 36; L Collins, et al, *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London, Sweet & Maxwell, 2012) para 9–205.

a Nigerian judge's application of the *lex fori* – a law with which he or she is familiar – increases legal certainty.

The idea that foreign law is a question of fact arouses curiosity. This concept simply means that foreign law is beyond the knowledge of a judge while in his or her capacity as a judge, even if the judge is actually well-versed in that foreign law. In other words, a judge cannot take judicial notice or embark on his or her own research of foreign law without counsel pleading it and adducing expert evidence to prove the foreign law. In reality, the conception that foreign law is a fact is presumptive, bearing in mind that a judge might be very knowledgeable of its content through his or her individual exposure.[14] The main rationale for treating foreign law as a fact lies in legal certainty – the need to ensure that a judge does not misapply what is not Nigerian law.

The above discussion on the nature of foreign law in Nigeria leads to another important question: what *is* foreign law in Nigeria?

III. What is Foreign Law in Nigeria?

Foreign law can take on different forms: statute, customary law,[15] common law, and equity. This point is significant because, for example, it can be argued that foreign customary law is so different that it should always be subject to the rules of proof. On the other hand, statute and other written law may be easily proved.

It was stated earlier in this chapter that proving foreign law by expert evidence is both costly and inconvenient for litigants, and the applicable law is of considerable significance to the rights and remedies of the parties. Thus, a Nigerian judge should be careful to ensure that he or she does not refuse to apply [Nigerian] law that is not proved on the basis that it is 'foreign' (or not Nigerian law), when it is actually 'Nigerian law'.[16] In other words, a Nigerian judge has a general duty to ensure that what is ordinarily regarded as 'foreign law' is not 'existing law' in Nigeria.[17]

[14] For example, a Nigerian judge who is also qualified to practise law in Russia and has published academic works on Russian law should be qualified to interpret Russian law without counsel pleading and adducing expert evidence.

[15] 'Customary law generally means relating to custom or usage of a given community. Customary law emerges from the traditional usage and practice of a people in a given community, which, by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired, to some extent, element of compulsion, and force of law with reference to the community. And because of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable.' – Tobi JSC in *Nwaigwe v Okeke* (2008) LPELR-2095 (SC).

[16] See generally *Joseph Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124.

[17] See generally s 315(1) of the 1999 Constitution. This is particularly significant with respect to the reception of international commercial treaties into the Nigerian legal system. See also *Joseph Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR (Pt. 1225) 495.

Flowing from the above, legislators in the National Assembly should consider extending the frontiers of what 'Nigerian law' is by taking into account the legal background of Nigerian judges, widely recognised and accepted international commercial customs and practices, and the goals of African integration. It is on this basis that foreign law is addressed from four perspectives: first, foreign law within the Nigerian Federation; second, foreign law within Commonwealth countries; third, unincorporated international law; and fourth, non-state law.

A. Foreign Law within the Nigerian Federation

The identification of what constitutes foreign law in Nigeria from a strict conflict of laws perspective may have created problems, as Nigeria is a Federation consisting of 36 States; the law of Imo State should ordinarily be 'foreign' to a judge sitting in Lagos State. However, as a matter of legal education Nigerian judges are familiar with the laws of Nigeria. The Evidence Act, 2011 honours this rule as it does not treat laws of States within Nigeria as 'foreign law' and compels Nigerian courts to take judicial notice of laws of States within the Federation.[18] Again, a Nigerian judge must be careful in ensuring that he or she does not refuse to judicially notice a Nigerian law. A judge may fall into the error of refusing to judicially notice Nigerian law because he or she thinks that law has been repealed. This may occur because the particular law in question was omitted and not included in, for instance, the revised edition of the Laws of the Federation of Nigeria or a State law, or the judge in question may wrongly infer as a matter of interpretation that the existence of a new law has repealed the law in question.[19] Nigerian appellate courts have held that in this situation the court is bound to take judicial notice of such law and apply it as existing law, except when it has been repealed by the competent legislative authority.[20]

Any reference to Nigerian law excludes customary law and Islamic law. A custom is required to be proved as a matter of fact unless a Nigerian court has

[18] Evidence Act 2011 s 122(2). *Benson v Ashiru* (1967) 1 All NLR 184; *AO Agunanne v Nigeria Tobacco Co. Ltd* (1979) 2 FNLR 13; *Peenok Ltd v Hotel Presidential Ltd* (1982) 12 SC 1; *Abcos (Nig) Ltd v Kango Wolf Power Tools Ltd* (1987) 4 NWLR (Pt. 67) 894, 900; *Bendel Newspapers Corp. v Okafor* (1993) 4 NWLR (Pt. 289) 617, 637–38; *Shitta-Bey v Attorney-General of the Federation* (1998) LPELR-3055(SC) 43; *Haruna v University of Agriculture, Markurdi & Ors.* (2004) LPELR-5899(CA) 38–39; *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc* (2006)19 NWLR (Pt. 1013) 20, 46–47; *Altimate Inv. Ltd v Castle & Cubicles Ltd* (2008) All FWLR (Pt. 417) 124, 131, 150; *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 277; *Wema Bank Plc v LIT (Nig) Ltd* (2011) 6 NWLR 479, 506; *University of Uyo v Akpan* (2013) LPELR-19995(CA) 51.

[19] *Joseph Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR (Pt. 1225) 495. See also *Macaulay v Raiffeisen Zentral Bank Osterreich Akiengesell Schaft (RZB) of Austria* (2003) 18 NWLR (Pt. 852) 282: *Alhaji Adebayo Azeez v Lufthansa German Airline* (2015) All FWLR 1017, 1032.

[20] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 276–77; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR (Pt. 1225) 495.

taken judicial notice of it.[21] A custom can be judicially noticed once it has been acted upon by a superior court of record.[22] One custom that has gained notoriety in Nigeria, even at the Supreme Court level, and which does not require proof by expert evidence, is the *bini*[23] customary law in Nigeria known as the *igiogbe*.[24]

It may be questioned why customary law within Nigeria should be proved as a matter of fact when, as a matter of legal education, a significant number of Nigerian judges study customary and Islamic law. The reason may not be surprising – customary law is an unwritten product of rules from time immemorial. Like historical facts, a custom's credibility is always at issue, and is best explained by expert evidence from people skilled in the interpretation and application of the custom. Also, it would be unrealistic for the law to assume that a judge in Imo State should be familiar with customary or Islamic law in Kano or Ogun State if it has not yet been acted upon by a superior court of record in Nigeria. The numerous customs that exist in Nigeria make it likely that a Nigerian judge will misapply 'foreign' customary law that he or she is unfamiliar with. A counterargument to this position is that judges who are familiar with the custom or Islamic law should preside over these cases so as to dispense with the time and costs expended in calling expert evidence. There are no shortages of Nigerian judges to perform this task. It appears that Nigerian legislators anticipated the above dilemma by permitting a custom which a superior court in Nigeria has acted upon *once* to be judicially noticed as fact, thereby dispensing with the requirement to call expert evidence in future cases involving the same custom.

At first sight, however, this solution appears to have its drawbacks. What if a custom that is accepted as fact is incorrectly applied, in the sense that the judge that first acted upon the custom incorrectly interpreted the content of the custom? The correct interpretation of Section 17 of the Evidence Act, 2011 is that the duty to judicially notice a custom that has been acted upon is subject to a judge's discretion.[25] A judge that is unsure about the correct interpretation of a custom, even if it has been acted upon by a superior court of record, should be free to request expert evidence; he or she should not be fettered by precedent.

Also, expert evidence can be called to prove that a custom in a community has since changed or lost its original form. The immortal words of Lord Atkin are

[21] See Evidence Act 2011 ss 17–18 and 73. Judicial notice is the ability of a judge to take note of a fact without having it proven. Usually such fact is widely known or generally accepted (such as a public holiday) or has gained notoriety in application by the courts of superior records in Nigeria.

[22] Evidence Act 2011 s 17.

[23] *Bini* is an ethnic group in Nigeria situated in Edo State. Nigeria has about 400 ethnic groups.

[24] 'Under the Bini native law and custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as "*Igiogbe*" in which the deceased/testator lived and died. Thus, a testator cannot validly dispose of the "*Igiogbe*" by his Will except to his eldest surviving male child. Any devise of the "*Igiogbe*" to any other person is void.': *Arase v Arase* (1981) NSCC 101, 114. See other Nigerian Supreme Court cases of *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 387; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259; *Agidigbi v Agidigbi* (1996) 6 NWLR (Pt. 454) 302–3; *Uwaifo v Uwaifo* (2013) 10 NWLR (Pt. 1361) 185.

[25] It justifies why the legislators used the word 'may' in s 17 of the Evidence Act 2011.

relevant in this connection. Speaking for the Privy Council in *Eleko v Government of Nigeria*,[26] he held that:

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilisation become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community *inter se* … It is the assent of the native community that gives a custom its validity, and therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.[27]

'Foreign law' must be proved as fact in Nigeria unless it has been judicially noticed. Yet, paradoxically, the Supreme Court has held that 'English law' is not 'foreign law' and therefore need not be proved by evidence as is usually required under the Evidence Act, 2011.[28] It is not clear if the reference to 'English law' in this Supreme Court judgment refers only to received English law that Nigeria has incorporated into Nigeria's legal system, or if it includes contemporary English law (which European law has significantly influenced). It is submitted that strictly interpreting the ordinary words of Section 122(2) of the Evidence Act, 2011 reflects the former interpretation; unincorporated English law is excluded from the types of law that a Nigerian court can judicially notice. Section 122(2) of the Evidence Act, 2011 does not adopt the approach of Section 74(1)(l) of the Evidence Act, 1990. Section 74(1)(l) mandated that Nigerian courts take judicial notice of 'all general customs, rules and principles which have been held to have the force of law in or by any of the superior courts of law or equity in England'; this provision is excluded from Section 122(2)(l) of the Evidence Act, 2011.[29] Thus, the Nigerian judicial practice and experience that reflects recourse to English law (that has not been imported into Nigeria's legal system) in interpreting Nigerian law (without proof as a matter of fact) is arguably no longer tenable under Section 122(2) of the Evidence Act, 2011.

The rationale for the provisions as contained in Section 74(1)(l) of the Evidence Act, 1990 lies in the history of British colonial rule – Nigeria borrowed from and based a significant part of its laws on English law, which should make Nigerian judges aware of the content of contemporary developments in English law. In this regard, the Court of Appeal in *Resolution Trust Corp v FOB Investment & Property Ltd*[30] held that 'courts in Nigeria tend to look at English cases and law in this area of conflict of laws [proof of foreign law] still being developed in this country as

[26] [1931] AC 662.

[27] *Eleko v Government of Nigeria* [1931] AC 662, 673.

[28] *Funduk Engineering Ltd v Mc Arthur* (1995) 4 NWLR (Pt. 459) 652.

[29] Section 122(2)(1) requires judicial notice of: 'all general customs. rules and principles which have been held to have the force of law in any court established by or under the Constitution and all customs which have been duly certified to and recorded in any such court …'.

[30] (2001) 6 NWLR (Pt. 708) 246.

forming part of our domestic laws; hence the constant reference to English cases and authorities'.[31]

B. Foreign Law within Commonwealth Countries

If the basis upon which law is classified as 'foreign' is the judge's knowledge of the law, it begs the question as to why a Nigerian judge classifies the laws in other Commonwealth countries (especially African countries that are a part of the same common law family as Nigeria) as 'foreign'.[32] Also, in light of the aims to promote African integration, should such litigants bear the cost and inconvenience of proving 'foreign' law? It is recommended that, as in *Ogunro v Ogedengbe*,[33] there should be a statutory response that allows Nigerian judges to take judicial notice of the law of other common law African countries (in deserving circumstances) that are tied to Nigeria in the same legal family and geographical connection.[34] Comparatively, a judge in Lesotho is permitted to take judicial notice of South African law because Lesotho and South Africa belong to the same Roman-Dutch legal family and have a proximate geographical connection.[35]

Admittedly, this recommendation has its shortcomings. Despite the fact that Nigeria belongs to the same legal family as other common law countries, such countries, even those in Africa, have implemented significant statutory changes that Nigerian judges are unfamiliar with. In addition, the possibility that other common law countries adopt different approaches or solutions to legal problems cannot be overlooked; a Nigerian judge that takes judicial notice of Ghanaian law may misapply it. Moreover, if the content of Nigerian law is similar to that of laws from other common law countries, it may be pointless to plead and prove it.

Notwithstanding the above, the truth is that in practice, Nigerian lawyers do make reference to judgments of Commonwealth or common law countries, and Nigerian courts treat judgments that share Nigeria's Commonwealth or common law tradition as persuasive authority without requesting the parties to prove that law. The proof of such laws is usually not disputed in such cases.[36] The rationale for this approach lies in the commonsense view that parties should not be required to prove foreign law that is notorious[37] – Nigerian judges should deem certain laws of Commonwealth countries as notorious.

[31] ibid, 264.

[32] Section 122(2)(h) of the Evidence Act 2011 obliges Nigerian courts to take judicial notice of '*territories* within the Commonwealth'.

[33] (1960) 5 FSC 137.

[34] See also *G & P Ltd v Commissioner of Taxes* (1960) 4 SA 163, 168; R Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 25–26.

[35] *Mohapi v Motleleng* (1985–89) LAC 316.

[36] See for example the Supreme Court's decision in *Attorney-General of Abia v Attorney-General of the Federation* (2002) 6 NWLR (Pt. 762) 542.

[37] *Saxby v Fulton* [1909] 2 KB 208, 211 (CA). *Cf El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 17, 736.

C. Unincorporated International Law

Incorporated international law does not constitute foreign law in Nigeria as it is part of the laws of Nigeria.[38] Nigerian courts are also obliged to take judicial notice of incorporated international law and apply it, without proof, just as the Supreme Court did in *JFS Investment Ltd v Brawal Line Ltd*[39] with respect to The Hague Rules, 1924[40] and as the Supreme Court did in *Ibidapo v Lufthansa Airlines*[41] with respect to the Warsaw Convention, 1929,[42] because both international treaties were domesticated into Nigeria's legal system.[43]

The status of unincorporated international law in Nigeria, however, is difficult to classify. Nigerian courts treat unincorporated international law as foreign law, but if the unincorporated international law has gained notoriety as custom in Nigerian courts, the court may take judicial notice of it and dispense with the need to prove it.[44] For instance, the Supreme Court of Nigeria in *Eagle Super Pack (Nig) Ltd. v African Continental Bank Plc*[45] held that:

> until a convention acquires the force of law by incorporation into the body of laws of this country or is shown to be a custom or usage which has regularly been recognised and upheld by the superior courts in Nigeria as to acquire general acceptance, a party in a civil suit wishing to rely on it must prove its existence, and the fact that the parties have agreed to their contract to let such convention or custom or protocol govern their relationship. A party relying on terms of an international convention must show proof that Nigeria has subscribed to such convention.[46]

Practically, it would be rare for an unincorporated international law to not be regarded as foreign law. The requirement that a superior court of record in Nigeria must recognise an international convention with notoriety before the international convention sheds its status as a foreign law is indeed a high bar.[47]

[38] Nigeria is a dualist country in the sense that until a foreign law is incorporated into local statutes by the National Assembly of Nigeria, a court cannot apply it. See s 12 of the 1999 Constitution of the Federal Republic of Nigeria. See also *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228; *Joseph Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR (Pt. 1225) 495.

[39] (2010) 18 NWLR (Pt. 1225) 495, 531–32.

[40] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ('Hague Rules'), and Protocol of Signature (Brussels, 25 August 1924).

[41] (1997) 4 NWLR (Pt. 498) 124, 149–50. See also *Alhaji Adebayo Azeez v Lufthansa German Airline* (2015) All FWLR 1017, 1032.

[42] Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 ('Warsaw Convention').

[43] (2010) 18 NWLR (Pt. 1225) 495, 531–32.

[44] See Evidence Act, 2011 ss 16–17 and 122(2)(l).

[45] (2006) 19 NWLR (Pt. 1013) 21.

[46] (2006) 19 NWLR (Pt. 1013) 21, 47.

[47] However, this is not the same thing as saying that it has become customary international law. Unincorporated international law is not the same thing as customary international law. For example, in Ghana customary international law is part of Ghanaian law – it does not have to be proved by expert evidence (see *Republic v High Court, ex parte Attorney General, NML Capital Ltd*,

The Supreme Court rendered the decision of *Eagle Super Pack (Nig) Ltd. v African Continental Bank Plc* before the Evidence Act, 2011 came into force.[48] This is particularly significant because the joint provisions of Sections 17 and 122(2)(l) of the Evidence Act, 2011 provide that a custom *may* be judicially noticed where it has been adjudicated upon *once* by a superior court of record. This requirement dispenses with the need to demonstrate that a custom from an unincorporated international law convention/treaty must have been regularly recognised and upheld by superior courts of record in Nigeria before it can be applied. Sections 17 and 122(2)(l), which are discretionary, ought to be applied with caution; bearing in mind that the legislature has constitutional powers to incorporate international treaties into Nigerian law, these legislative powers should not be judicially usurped.[49]

D. Non-state Law

Nigerian courts will apply non-state law such as those created by the International Chamber of Commerce ('ICC') without the need to prove it if the parties incorporate it into their contract as express terms of the contract.[50] If the parties do not incorporate non-state law, such as International Commercial Terms, the UCP,[51] and the Uniform Rules for Demand Guarantees[52] into their contract, non-state law must be pleaded and proved.

The UCP is particularly significant as it has gained wide acceptance in the international commercial community and banking institutions regarding letters of credit transactions. Nigerian superior courts of record have been confronted with the question of whether this elevates unincorporated provisions of the UCP to a custom that should be judicially noticed, having been previously applied by

Civil Motion No. J5/10/2013 (Supreme Court of Ghana, 2013)). Although, from our research, this issue has not been directly engaged in Nigerian appellate courts, the Supreme Court in *Attorney-General of Abia v Attorney-General of the Federation* (2002) 6 NWLR (Pt. 762) 542 actually applied some principles of customary international law without inviting the parties to prove it.

[48] The former s 14(2) of the Evidence Act, Cap 112, LFN 1990 provided that 'custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.'

[49] Constitution of the Republic of Nigeria 1999 ss 12 and 4.

[50] *Akinsanya v United Bank for Africa* (1986) 4 NWLR (Pt. 35) 273; *Nasaralai v Arab Bank* (1986) 4 NWLR (Pt. 36) 409; *Attorney-General of Bendel State v United Bank for Africa* (1986) 4 NWLR (Pt. 37) 547; *Eagle Super Pack (Nig) Ltd. v African Continental Bank Plc* (2006) 19 NWLR (Pt. 1013) 21. Two significant non-state laws used by banks are Uniform Customs and Practice for Documentary Credits ('UCP') 2010 Revision, ICC Publication no 758 and Uniform Rules for Demand Guarantees ('URDG') 2010 Revision, ICC Publication no 758.

[51] 2007 Revision, ICC Publication no 600.

[52] 2010 Revision, ICC Publication no 758.

Nigerian courts where the parties incorporated it into their contract. In *Vaswani GmbH v Best Stores Ltd*,[53] the defendant, a Nigerian company, employed the plaintiff in Germany as its confirming house for placement of imports from Hong Kong and Singapore, based upon invoices for purchases of goods in US Dollars, and authorising the plaintiff to open letters of credit on the invoices. The plaintiff's practice was to convert the quotations in US Dollars to Deutsche Marks and charge the defendant for the Naira equivalent based on the conversion to Deutsche Marks, thereby causing the Nigerian company to pay more Naira to meet the letters of credit, which was less than paying in US Dollars. The defendant's counter claim was that the system adopted by the plaintiff was contrary to the UCP, which prohibited conversion or switching to a different currency from the currency of the letter of credit. The plaintiff contended that the [unincorporated] UCP was not applicable to Nigeria. The defendant, in a bid to prove that the UCP was a custom among banks, called an expert from the Central Bank of Nigeria who testified that the UCP was the custom of bankers in their banking trade of letters of credit. Onalaja J at the High Court (as he then was) held in favour of the defendant; he held that the UCP was applicable to Nigeria as an international custom of trading by banks in the international trade of payment by letter of credit. The parties did not appeal.

Vaswani GmbH may be contrasted with *Eagle Super Pack (Nig) Ltd* above. In *Eagle Super Pack (Nig) Ltd*, the plaintiff (a buyer) wanted to pay a Japanese seller the sum of US$16,180 for raw materials to be imported. The plaintiff entered into a contract with the defendant bank to issue a letter of credit in favour of the Japanese seller. The defendant bank failed to issue the letter of credit in favour of the Japanese seller despite the plaintiff performing its part of the contract. The plaintiff sued the defendant for negligence, for failure to perform its part of the contract, and for damages for the loss the plaintiff had incurred in the transaction. The defendant invoked Articles 18 and 19 of the UCP to argue that it was only acting as an agent of the plaintiff, that it was not negligent, and therefore should not be held liable.[54] The High Court rejected the defendant's position and held that Nigeria was not a signatory to the UCP, nor did the parties incorporate the provisions of UCP into their contract. The Court of Appeal overturned the High Court's decision. Onalaja JCA (with whom the other Justices concurred) held that the Supreme Court had previously utilised the UCP as being of international customary usage, and the Court of Appeal took judicial notice of it.[55] The primary motivation for the Court of Appeal in judicially noticing the UCP as a custom also stems from its prominence and usefulness to banks – a point the Court of Appeal placed considerable emphasis on. The Supreme Court overturned the Court of Appeal's decision. The Supreme Court held that in the cases which the Supreme Court had previously

[53] Unreported Suit No LD/424/77 of 31 October 1981.
[54] UCP 1983, revision ICC Publication No. 400.
[55] (1995) 2 NWLR (Pt. 379) 590.

utilised the UCP,[56] the UCP had been incorporated into the parties' contract.[57] The Supreme Court restored the decision of the High Court and made the same pronouncement as it did on the status of unincorporated international statutes in respect of the UCP.

The Supreme Court was right. The High Court's decision in *Vaswani* and the Court of Appeal's decision in *Eagle Super Pack* were wrongly decided. Nigeria has not domesticated the UCP as a statute and the parties in the respective cases did not incorporate the terms of the UCP into their contract. In addition, accepting these wrongly decided cases would have created legal uncertainty. The UCP is usually subject to revisions by the ICC. As such, parties that incorporate non-state law into their contract must expressly provide the version of the non-state law that they want to govern a part of their contract. Where parties do not exercise the option of incorporating a particular version of non-state law into their contract, the court cannot embark on a voyage to ascertain which version of the non-state law the parties wanted to incorporate into their contract.

IV. Proof of Foreign Law

Under the Evidence Act, 2011, when a court has to decide a point of foreign law, the opinions on that point of persons especially skilled in such foreign law (experts) are considered relevant facts. A Nigerian court may regard the opinions of an expert who is acquainted with such law in his or her profession as admissible evidence. An expert may produce books before the court which he or she declares to be works of authority upon the foreign law in question. A court, after hearing the expert's opinion evidence, is entitled to construe the books for itself. Any question as to the effect of evidence given with respect to foreign law is decided by the judge.[58]

In determining whether a person is 'especially skilled', the test is always the knowledge and experience of the particular witness and whether the evidence justifies the conclusion that the expert is especially skilled. This equates to special knowledge, training, or experience in the matter in question.[59] In this regard, it was held that a Russian lawyer and head of the legal department of Sovfracht, a state-operated firm of shipping brokers in Russia, qualified as an expert on Russian law.[60] However, it is also important that the person adduces evidence as to his or

[56] *Akinsanya v United Bank for Africa* (1986) 4 NWLR (Pt. 35) 273; *Nasaralai v Arab Bank* (1986) 4 NWLR (Pt. 36) 409; *AG Bendel State v UBA* (1986) 4 NWLR (Pt. 37) 547.

[57] (2006) 19 NWLR (Pt. 1013) 21, 47.

[58] Evidence Act, 2011 ss 68–69; *Melwani v Chanhira Corporation* (1995) 6 NWLR (Pt. 402) 438; *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349.

[59] *Ajami v The Comptroller of Customs* (1952–55) 14 WACA 34; *Ajami v The Comptroller of Customs* (1952–55) 14 WACA 37.

[60] *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) 3 ALR Comm 192.

her qualifications and skill; otherwise, the evidence may be rendered inadmissible. Thus, in *Melwani v Chanhira Corporation,*[61] the Court of Appeal held that although a professional businessman (a managing director of the plaintiff company in this case) that was acquainted with the law or field in issue – regarding the validity of the issuance of a company's certificate of incorporation under the law of Panama – might be qualified as an expert, his failure to state his qualifications and adduce evidence to that effect rendered his testimony of no effect.[62]

Foreign law may be proved like any other fact. The party alleging that foreign law is different from Nigerian law bears the onus of proving it.[63] Foreign law can be proved by either oral or affidavit evidence, which is significant because the use of affidavit evidence is faster and more cost-effective for litigants, particularly where the affidavit evidence on foreign law is unchallenged. In *Sonnar (Nigeria) Ltd v Partenreedri MS 'Norwind'*,[64] the plaintiff sued the defendants situated in Germany and Thailand for breach of contract for failing to supply some bags of parboiled rice to Nigeria. The plaintiff applied to court to serve the writ of summons out of jurisdiction on the German defendants. Counsel for the German defendants opposed the application on the basis of a German foreign jurisdiction clause contained in the bill of lading contract for the supply of the parboiled rice to Nigeria and requested a stay of proceedings in favour of the German courts. It was common ground that the contract was governed by German law. The entire case was conducted with affidavit evidence; no oral evidence was led. The plaintiff's affidavit evidence relied on a letter from solicitors skilled in German law, which letter provided that German courts would not exercise their jurisdiction to enforce the bill of lading contract, and it would consequently be deprived of a remedy.[65] The defendant did not challenge this evidence. The High Court granted a stay in favour of the German court. The plaintiff appealed. The Court of Appeal dismissed the appeal.[66] In a unanimous decision, Kolawole JCA of the Court of Appeal held that the letter from the solicitors on German law was unsatisfactory proof of foreign law and was therefore inadmissible.[67] The plaintiff appealed to the Supreme Court, and the Supreme Court unanimously allowed the appeal.[68]

The Supreme Court's judgment discussed at length the doctrine of *forum conveniens* and the foreign jurisdiction clause; little attention was paid to the issue of whether German law was satisfactorily proved – although it was not the principal issue in the case. Eso JSC in his leading judgment did not dwell much on

[61] 6 NWLR (Pt. 402) 438.

[62] *Melwani v Chanhira Corporation* (1995) 6 NWLR (Pt. 402) 438, 458–59.

[63] *Resolution Trust Corporation v FOB Investment & Property Ltd* (2001) 6 NWLR (Pt. 708) 246, 261.

[64] (1987) 4 NWLR 520(SC); (1985) 3 NWLR 135.

[65] There was a recent Hamburg Rules decision that held that an owner cannot be a carrier in a bill of lading contract for a charterparty. In addition, the action would be statute-barred in Germany. This was in sharp contrast to the position under Nigerian law under Article III 6 of the Carriage of Goods by Sea Cap. 29 of 1958.

[66] (1985) 3 NWLR 135.

[67] ibid, 143–45.

[68] (1987) 4 NWLR (Pt. 66) 520.

this significant point of proof of German law,[69] despite the fact that the decisive factor he utilised in refusing a stay in favour of the German defendant was that 'the action is time-barred in the foreign court and the grant of stay would amount to permanently denying the plaintiffs any remedy'.[70] In other words, Eso JSC did not address in detail the significant issue of whether the plaintiff's affidavit evidence sufficiently proved German law. Eso JSC was, however, content with the admission by learned counsel for both parties that the action was time-barred in the German courts.[71] Nnamani JSC, in his concurring judgment, adequately addressed the issue of proof of German law when he held that:

> having perused the letter attached to the counter-affidavit [of the plaintiff] referred to earlier, it certainly is not a satisfactory evidence of German law [on the issue of time-bar in the German courts and German courts refusing to exercise jurisdiction], particularly when it was pointed out that the firm of solicitors … appear to have been 'forum hunting'. *Nevertheless, it was some evidence of German law and the counter-affidavit of the appellants remained unchallenged by the respondents* (emphasis added).[72]

In contrast, in *Resolution Trust Corporation v FOB Investment & Property Ltd*,[73] the Court of Appeal rejected the second defendant's submission on proof of foreign law mainly on the ground that there was 'no fact or averment in the affidavit supporting the application in this regard'.[74]

The implication of the above decisions is that where foreign law is adduced by affidavit evidence and goes unchallenged, the court *may* accept it as a fact admitted and apply it even if the evidence is unsatisfactory.[75] However, if the affidavit evidence is challenged, then oral evidence must be adduced to reconcile conflicting evidence when proving foreign law.[76]

Foreign law does not need to be proved if the court is bound to take judicial notice of it.[77] The Court of Appeal has held that 'Chinese Regulations are not part of the laws to be judicially noticed under Section 122 of the Evidence Act 2011.'[78]

[69] ibid, 538–39. Oputa JSC in his concurring judgment did not give this issue significant attention.

[70] ibid, 538–39.

[71] *Sonnar (Nigeria) Ltd v MS 'Norwind'* (1987) 4 NWLR (Pt. 66) 520, 538 – 'it is accepted by both counsel that the action, if it does not lie in the Nigerian court would be too late to be brought in the German Court!'.

[72] (1987) 4 NWLR (Pt. 66) 520, 541.

[73] (2001) 6 NWLR (Pt. 708) 246.

[74] ibid, 264.

[75] See generally Evidence Act, 2011 ss 20–27. See also *Olubode v Oyesuxi* (1977) 5 SC 79; *Balogun v Labiran* (1988) 3 NWLR (Pt. 80) 66; *MozieI v Mbamalu* (2006) 12 SCM (Pt. 1) 306, 317; *Reptico SA Geneva v Afribank Nigeria Plc* (2013) LPELR-20662.

[76] *Nigerian National Supply Company Ltd v Alhaji Hamajoda Sabana & Co Ltd* (1988) 2 NWLR 23; *Atanda v Olarenrewaju* (1988) 4 NWLR (Pt. 89) 394; *Niger Progress Ltd v North East Line Corporation* (1989) 3 NWLR (Pt. 107) 68, 94–95; *Military Administrator, Federal Housing Authority v Aro* (1991) 1 NWLR (Pt. 168) 405; *Okafor v Igbo* (1991) 8 NWLR 476; *Okere v Nlem* (1992) 4 NWLR (Pt. 234) 132; *Momah v VAB Petroleum Inc* (2000) 4 NWLR (Pt. 654) 534; *Eimskip Ltd v Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

[77] Evidence Act, 2011 s 122.

[78] *Egypt Airline v Abdoulaye* (2017) LPELR-43331 (CA), 11–13 (Daniel-Kalio JCA).

V. Exclusion of Foreign Law

Nigerian courts may yet refuse to apply foreign law that a party has pleaded and proved. The basis upon which Nigerian courts will refuse to apply foreign law is not certain. For example, Oputa JSC in *Sonnar (Nigeria) Ltd v MS 'Norwind'*[79] created a long list of conditions upon which Nigerian courts will allow the application of foreign law. Oputa JSC stated that

> the choice of law must be *real, genuine, bona fide, legal and reasonable*. It should not be capricious and absurd … the proper law of the contract must have some relationship to, and must be connected with the realities of, the contract considered as a whole' (emphasis added).[80]

In this regard, Oputa JSC observed that he regarded choosing 'German law to govern a contract between a Nigerian shipper and a Liberian "shipowner" as "capricious and absurd"'.[81] Some Nigerian judges have been attracted to this dictum, and have approved it.[82]

Oputa JSC's decision is open to criticism. How does the court assess this long list of factors in excluding the application of foreign law? What test is to be used in applying these factors in court? Simply put, it is a huge disincentive for international traders to choose Nigerian courts in business transactions – bearing in mind that after going through the cost and inconvenience of pleading and proving foreign law, the question of whether the Nigerian court will then actually apply the foreign law will constitute yet another hurdle. Fortunately, the decision was made *obiter*; Nigerian courts are not bound by it. It is submitted that the applicable foreign law should only be excluded on narrow and justifiable grounds such as public policy,[83] or violation of the Nigerian Constitution.[84] This will make Nigerian courts an attractive forum for dispute resolution, to international business persons who would view Nigerian courts as not being hostile to the application of foreign law.

Where customary law conflicts with an enabling statute or the Nigerian Constitution, it will be declared invalid by a Nigerian Court.[85] In addition,

[79] (1987) 4 NWLR (Pt. 66) 520.

[80] ibid, 544.

[81] ibid, 544.

[82] *Lignes Airiennes Congolaises v Air Atlantic Nigeria* (2006) 2 NWLR (Pt. 963) 49, 81.

[83] See generally *Adesanya v Palm Line Ltd* (1967) 2 ALR Comm 133; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495; *Beaumont Resources Limited v DWC Drilling Limited* (2017) LPELR-42814 (CA) (Sankey JCA, 49–50).

[84] See also *Salubi v Nwariaku* (1997) 5 NWLR (Pt. 505) 442, 477; *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37; *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA); *Anonde v Mmeka* (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA); *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v Ugbene* (2016) LPELR-42110 (CA) 64–67; *Okeke v Okeke* (2017) LPELR-42582 (CA).

[85] *Salubi v Nwariaku* (1997) 5 NWLR (Pt. 505) 442, 477; *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37; *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA);

Section 18(3) of the Evidence Act, 2011 provides that 'in any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good, conscience.' In interpreting Section 18(3) of the Evidence Act, 2011, the immortal words of the Supreme Court in *Okonkwo v Okagbue*[86] should be followed to the effect that:

> conduct that might be acceptable a hundred years ago may be heresy these days and *vice versa*. The notion of public policy ought to reflect the change. That a local custom is contrary to public policy and repugnant to natural justice, equity and good conscience necessarily involves a value judgment by the court. But this must objectively relate to contemporary mores, aspirations, expectations and sensitivities of the people of this country and to consensus values in the civilised international community which we share. We must not forget that we are a part of that community and cannot isolate ourselves from its values. Full cognisance ought to be taken of the current social conditions, experiences and perceptions of the people. After all, custom is not static.

VI. Conclusion

This chapter has brought to the fore the significance of the nature and proof of foreign law in civil proceedings in Nigeria. There are important areas that may still require statutory intervention, such as judicially noticing the law of countries that belong to the same common law family as Nigeria (especially African countries, which would advance the aim of African integration) and widely accepted international commercial practices. In the latter situation, the best approach will be to incorporate significant and widely accepted international commercial treaties or non-state law into Nigerian law so as to avoid the problems associated with proof of foreign law in civil proceedings, and thereby meet the needs of international business persons who would be attracted to litigate in Nigerian courts in this situation.

Anonde v Mmeka (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA); *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v Ugbene* (2016) LPELR-42110 (CA) 64–67; *Okeke v Okeke* (2017) LPELR-42582 (CA).

[86] (1994) 9 NWLR (Pt. 368) 301.

4

Domicile

I. Introduction

Connecting factors in private international law indicate which law or jurisdiction should govern a dispute. Domicile is one such connecting factor, and is particularly significant in matters related to jurisdiction, family law, property law, and other issues affecting parties' legal rights and privileges.[1] Domicile is a legal concept that is used to connect a person with a legal system or country for certain legal purposes.[2] Domicile represents a party's permanent home, such that wherever that party goes, it is assumed that he or she intends to return home.[3] Domicile is an important connecting factor, especially in matrimonial proceedings. For instance, a Nigerian court does not have jurisdiction over a matrimonial proceeding if the petitioner is not domiciled in Nigeria.[4] A party's domicile is determined by the law of the forum.

Domicile is a distinct concept from those of nationality and residence.[5] The distinction between domicile and residence is particularly significant because they are often incorrectly used synonymously.[6] First, although evidence in support of residence may also be evidence in support of domicile,[7] by no means can it be inferred from a party's residence that domicile automatically results, even though

[1] For academic commentary see also IO Agbede, '*Lex Domicilii* in Contemporary Nigeria: A Functional Analysis' (1973) 9 *African Legal Studies* 61, 93; FN Ekwere, 'Is there Domicile of Dependence in Nigerian Conflict of Laws?' (2000) 12 *African Journal of International and Comparative Law* 616; AO Nwafor, 'The Requisite Intention for the Acquisition of Domicile of Choice: Permanent or Indefinite – A Comparative Perspective' (2013) 21 *African Journal of International and Comparative Law* 327–44; L Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11 *Journal of Private International Law* 317. *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 367.

[2] *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt. 117) 85, 93.

[3] *Sodipo v Sodipo* (1990) 5 WBRN 98; *Koku v Koku* (1999) 8 NWLR (Pt. 616) 672, 680; *Omotunde v Omotunde* (2001) 5 WRN 148, 174. It should be noted that 'home' here is not a reference to a building.

[4] Matrimonial Causes Act, Cap M7 LFN 2010 s 2(2)(a); *Jones v Jones* (1938) 14 NLR 12; *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt. 117) 85 at 92; *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 357–58, 367; *Bhojwani v Bhojwani* (1996) 6 NWLR (Pt. 457) 661; *Omotunde v Omotunde* (2001) 5 WRN 148, 173–74; *Ugo v Ugo* (2008) 5 NWLR (Pt. 1079) 1.

[5] *Koku v Koku* (1999) 8 NWLR (Pt. 616) 672, 680; *Omotunde v Omotunde* (2001) 5 WRN 148, 179.

[6] *Omotunde v Omotunde* (2001) 5 WRN 148, 174.

[7] *Osibamowo v Osibamowoi* (1991) 3 NWLR (Pt. 117) 85, 92–93.

the party does not have any other residence in existence or in contemplation.[8] Second, whereas residence usually means the bodily presence of an inhabitant in a given place without the intention to stay there permanently, domicile usually requires bodily presence plus an intention to make the place a permanent home.[9] Third, a person may have more than one residence at a time but only one domicile.[10]

II. What Does it Mean to be Domiciled in Nigeria?

As Nigeria is a Federal state, one may query: what does it mean to be domiciled in Nigeria? Is a person domiciled in only one State in the Federation, the Federation as a whole, or both – being within a State and the Federation at the same time and for the same purpose? There does not appear to be direct authority that answers this question. As has been mentioned, this question is particularly significant in matters of matrimonial proceedings where establishing the Nigerian domicile of the petitioner is fundamental to the existence of a court's jurisdiction. Prior to the enactment of the Matrimonial Causes Act, there were two schools of thought. One held that domicile anywhere in Nigeria was sufficient to give the court jurisdiction.[11] The second school of thought regarded domicile in Nigeria as domicile in a region or State of the Federation.[12] The rationale for this view was based on a Federal State's territorial jurisdiction. Since the principles of international law view each State as a separate jurisdiction, a person can only be domiciled in a State and not in Nigeria generally.[13] The enactment of the Matrimonial Causes Act has now put this judicial disagreement to rest. Section 2(3) of the Matrimonial Causes Act provides that a person domiciled in any State of the Federation is domiciled in Nigeria for the purpose of instituting matrimonial proceedings, whether or not he or she is domiciled in that particular State.

It is suggested that the approach adopted in Section 2(3) of the Matrimonial Causes Act should be extended to other subject areas of private international law in Nigeria (regarding jurisdiction), where the determination of the domicile of the parties becomes an issue. This approach creates legal certainty and reduces litigation costs, as it is much easier to predict and ascertain domicile in Nigeria than domicile in a State of Nigeria. However, this extension may be inappropriate for matters of choice of law. For instance, if a person is domiciled in the whole

[8] *Bell v Kennedy* (1868) LR 1 HL Sc 307, 321; *Shyngle v Shyngle* (1923) 4 NLR 94, 96; *Adeyemi v Adeyemi* (1962) LLR 70; *Fonseca v Passman* (1958) WRNLR 41; *Omotunde v Omotunde* (2001) 5 WRN 148.

[9] *Omotunde v Omotunde* (2001) 5 WRN 148, 174.

[10] ibid, 174.

[11] *Nwokedi v Nwokedi* (1958) LLR 112.

[12] *Okonkwo v Eze* (1960) WRNLR 80; *Machi v Machi* (1960) LLR 103; *Adeyemi v Adeyemi* (1962) LLR 70; *Adeoye v Adeoye* (1962) NNLR 63.

[13] *Okonkwo v Eze* (1960) WRNLR 80; *Machi v Machi* (1960) LLR 103; *Adeyemi v Adeyemi* (1962) LLR 70; *Adeoye v Adeoye* (1962) NNLR 63.

of Nigeria and each State has a different law regarding succession to his or her movables, which State's law applies? The extension of this rule is likely to create confusion in the area of choice of law.

III. Types of Domicile

There are three types of domicile: domicile of origin, domicile of choice, and domicile of dependence. As will be explained, however, some Nigerian judges have doubted the existence of the domicile of dependence as part of Nigerian law, and prefer to classify it under either domicile of origin or domicile of choice, as the case may be.

A. Domicile of Origin

Domicile of origin is the first type of domicile that every person acquires.[14] Domicile of origin is determined by the status of a child at the time of birth or adoption.[15] In other words, a child's domicile of origin at birth derives from that of the child's parents. This general principle of law leaves some gaps in Nigerian private international law: is a child's domicile of origin derived from the child's father or mother? In Nigerian private international law, there is authority that suggests that a child's domicile of origin derives from the father in the same way a married woman's domicile is dependent on her husband.[16] This position is, however, open to question in light of Section 42(1) of the 1999 Constitution, which prohibits discrimination on the grounds of gender. It is suggested that a gender-neutral judicial and legislative response will address this human rights concern. Nigeria can benefit from legislating along the lines of Section 28 of British Columbia's Infants Act,[17] which provides that:

> The domicile of an infant is,
>
> (a) if the infant usually resides with both parents and the parents have a common domicile, that domicile,
> (b) if the infant usually resides with one parent only, that parent's domicile,
> (c) if the infant usually resides with a person who is not a parent of the infant and that person has lawful custody of the infant, that person's domicile, or
> (d) if the infant's domicile cannot be determined under paragraph (a), (b) or (c), the jurisdiction with which the infant has the closest connection.

[14] *Omotunde v Omotunde* (2001) 5 WRN 148, 174.

[15] The distinction between legitimate and illegitimate children no longer exists in Nigerian law by virtue of s 42(2) of the 1999 Constitution which provides that 'no citizen of Nigeria shall be subject to any disability or deprivation merely by the reason of the circumstances of his birth'. See *Salubi v Nwariaku* (2003) 7 NWLR (Pt. 819) 426 construing the similarly worded s 39(2) of the 1979.

[16] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 364.

[17] Infants Act, RSBC 1996 c 226.

A domicile of origin is not lost until a domicile of choice is acquired. Indeed, a domicile of origin is never destroyed, but remains in abeyance when a new domicile of choice is chosen, and is revived and comes again into operation when the new domicile is abandoned.[18] The revival of one's domicile of origin when the domicile of choice is abandoned could also be labelled as either the 'doctrine of revival' or the 'doctrine of reversion'. The doctrine of revival is important because it demonstrates the importance that the common law places on the connecting factor of domicile of origin. The doctrine of revival, however, has its advantages and disadvantages.

Regarding its advantages, it can be argued that, firstly, it provides certainty and predictability to a person who wishes to renounce a domicile of choice, or simply does so without adopting an alternative domicile of choice. Secondly, the resilience of a person's domicile of origin makes it easier to provide advice on the applicable law arising from the revival of that domicile of origin. Thirdly, the failure to revive a domicile of origin on abandonment of a domicile of choice could lead to uncertainty by giving rise to three possible domiciles: the continuation of the 'abandoned' domicile of choice if that person maintains personal and physical connections there; the adoption of another domicile of choice such as a place to which that person has moved residence; or reinstating the domicile of origin. In summary, automatic revival of a domicile of origin provides clarity in choosing one among the three possible domiciles.[19]

Regarding its disadvantages, it can be argued that firstly, a domicile of origin serves no further purpose than a point of commencement from which a person may literally depart, although it does provide certainty in regard to domicile. Secondly, a domicile of origin ought not to be revived unless there is objective evidence that a person seriously intends to revive it. Thirdly, a person's domicile of origin ought to revive only if it is supported by renewed connections to that place. The overriding rationale against the automatic revival of domicile is that we have passed the age of territoriality in which a person is held to embrace a domicile of origin with which that person no longer has any reasonable affiliation.[20] Finally, reverting automatically to a domicile of origin after a domicile of choice is abandoned 'may be arbitrary and perverse.'[21]

Some common law jurisdictions have abandoned the doctrine of revival.[22] It is recommended that Nigerian law should recognise that the domicile of a person continues until that person acquires a new domicile.

[18] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 364; *Omotunde v Omotunde* (2001) 5 WRN 148, 174 (Adekeye JCA as she then was); *Ugo v Ugo* (2008) 5 NWLR (Pt. 1079) 1, 25 (Adekeye JCA as she then was).

[19] L Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11 *Journal of Private International Law* 317, 325.

[20] ibid, 325.

[21] ibid, 324.

[22] See eg (from Manitoba) Domicile and Habitual Residence Act, CCSM c. D96, ss 3(a) and 6.

There is always a strong presumption that the domicile of origin subsists until it is rebutted by cogent evidence.[23] Domicile of origin is perhaps the most significant of the other types of domicile because that is usually what the court first establishes before it considers other forms of domicile.[24]

B. Domicile of Choice

Domicile of choice is acquired by physical presence in a place coupled with the intention to permanently reside in that place. The intention to acquire a domicile of choice must refer to *one* territory or country, as the case may be. In other words, a person cannot have the intention to acquire more than one domicile of choice.

To establish whether a person has chosen a place as his or her domicile of choice, the facts of the person's residence and intention to make that place a permanent home (*animus manendi*) must be considered.[25] The party who asserts a change from domicile of origin to a domicile of choice bears the onus of proving it.[26] There are no concrete rules for establishing the change from domicile of origin to domicile of choice; it usually requires a detailed analysis and assessment of available facts to discover the mind of the party concerned.[27] Although, as stated earlier, residence may provide some proof to establish domicile of choice, the mere fact of residence, regardless of duration, is not enough to establish a domicile of choice; it must be accompanied with unequivocal evidence of an intention to remain there permanently (*animus manendi*).[28]

Nigerian courts have adopted and utilised several tests or guides for assessing the acquisition of a domicile of choice, including standards such as 'the necessary intention must be clearly and unequivocally proved',[29] 'genuine intention',[30] 'mind must be made up',[31] 'satisfactory evidence as to the state of mind',[32] 'perfect clearness',[33] 'abundantly clear evidence',[34] 'intention freely formed to reside in a

[23] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 367–68.

[24] ibid, 367.

[25] ibid, 367.

[26] *Adeyemi v Adeyemi* (1962) LLR 70; *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 364, 368.

[27] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 365.

[28] *Fonseca v Passman* (1958) WRNLR 41; *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 368; *Omotunde* v *Omotunde* (2001) 5 WRN 148, 175. See also *Adeoye v Adeoye* (1962) NNLR 63; *Udom v Udom* (1962) LLR 112; *Odiase v Odiase* (1965) NMLR 196.

[29] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 365; *Omotunde v Omotunde* (2001) 5 WRN 148, 175.

[30] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 365–66.

[31] ibid, 365.

[32] ibid, 365.

[33] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 364; *Omotunde v Omotunde* (2001) 5 WRN 171, 174.

[34] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 367. See also *Shyngle v Shyngle* (1923) 4 NLR 94, 96.

certain territory indefinitely', and 'not by mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure'.[35]

From the above, it is submitted that domicile of choice is not one that is easily established. In reality, the proof required to establish a change from domicile of origin to domicile of choice resembles the criminal law standard of 'proof beyond a reasonable doubt'.[36]

In *Adeyemi v Adeyemi*,[37] the petitioner was the wife of the respondent, and by operation of law, acquired the domicile of her husband. The action for divorce was instituted in Lagos. At issue was whether the Lagos court had the jurisdiction to entertain the dispute.[38] The petitioner argued that the respondent's domicile of origin (which was the then Western Region of Nigeria) had changed (by choice) to Lagos, and therefore her domicile by operation of law (or domicile of dependence) was now Lagos. The petitioner relied on the respondent's residence and work in Lagos, the fact that the respondent had previously expressed the view that he preferred to live in Lagos and did not like the idea of going to his domicile of origin and mixing with people there, and the fact that the respondent did not attend his father's funeral, which took place in the then Western Region of Nigeria.

The Court found that the petitioner's evidence was not strong enough to establish that 'the respondent had ever formed a fixed and settled purpose of abandoning his Western Nigerian domicile and settling finally in Lagos …'.[39] Although not expressly stated by the Court, it is submitted that there were considerable doubts as to whether the respondent had acquired a domicile of choice in Lagos because, whereas the petitioner admitted in response to questions by the Court that the respondent had a family home in the Western Region of Nigeria, he had no house in Lagos.

Also, in *Bhojwani v Bhojwani*,[40] the petitioner's domicile of origin was Singapore, though the petitioner had been a resident in Nigeria for about 14 years as a businessman. The Court of Appeal unanimously held that the petitioner had not established that he had acquired a Nigerian domicile of choice. There were two factors that were particularly decisive in reaching this decision. First, and perhaps most importantly, the intention to acquire a Nigerian domicile of choice, as demonstrated in his affidavit evidence, was neither true nor genuine. In 1994, the petitioner had deposed in an affidavit in separate proceedings in London that he had considered gradually relocating his wife and children to Singapore and returning to work in Singapore permanently – some of the reasons for which were based on his dissatisfaction with Nigeria's social amenities and political situation at

[35] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 367.

[36] L Trakman, 'Domicile of Choice in English Law: An Achilles Heel? (2015) 11 *Journal of Private International Law* 317, 328.

[37] (1962) LLR 70.

[38] This was the period before s 2(3) of Matrimonial Causes Act came into force, when territorial domicile within a State or region in Nigeria was significant.

[39] *Adeyemi v Adeyemi* (1962) LLR 70, 72.

[40] (1995) 7 NWLR (Pt. 407) 349.

the time. Uwaifo JCA (as he then was) was particularly unsparing of the petitioner when he held that

> the petitioner could not overcome the implication of his affidavit sworn in London on 13 December 1994. His belated assertion of his settled or re-affirmed intention to remain in Nigeria is without foundation. It is mere verbality borne out of a poverty of veracity.[41]

Sulu-Gambari JCA added that 'the Petitioner cannot be allowed … to shift his claim for domicile [from Singapore to Nigeria] merely to please himself at the detriment of the respondent in order to obtain a cheap divorce in Nigeria.'[42] The second factor was that the petitioner's residence in Nigeria was not voluntary or freely formed; he was in Nigeria for business purposes only and he was unable to demonstrate that he wanted to make Nigeria his permanent home other than for business purposes.

This second ground for refusing to accept the acquisition of a domicile of choice in *Bhojwani v Bhojwani* is also one of the bases upon which the Court of Appeal's decision in *Omotunde v Omotunde*[43] can be justified as correctly decided. In that case the petitioner's long (and nearly uninterrupted) residence in the United States of America for about 18 years was not enough for the respondent to establish that the petitioner had acquired a United States domicile of choice and abandoned his domicile of origin (Nigeria), which he only visited for 10 days during his stay in the United States. This is because the petitioner's residence in the United States was not voluntary; he was there to work as a medical practitioner. The respondent failed to prove that the petitioner's long residence in United States was accompanied with the intention to make the United States his permanent abode other than for work.

However, in *Ugo v Ugo*,[44] it was held that a domicile of choice (of the United States) was acquired where Nigerian citizenship was renounced in favour of US citizenship.

In summation, the above cases on the change from domicile of origin to domicile of choice all dealt with matrimonial proceedings, and in most of the cases Nigerian judges have been reluctant to hold that the petitioner established a sufficient intention to change from a domicile of origin to domicile of choice. It is open to doubt if this high bar can uniformly be applied to other areas of law. The underlying rationale for the rigidity of Nigerian law in reluctantly (except in truly exceptional cases) accepting a change from domicile of origin to domicile of choice is likely also motivated by the need to ensure that the Nigerian forum is not easily invoked as an institution to 'destroy' marriage. In other words, divorce, judicial separation, and the like should not be lightly obtained in Nigeria.[45] Notwithstanding the

[41] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 366–67.
[42] ibid, 370.
[43] (2001) 5 WRN 148.
[44] (2008) 5 NWLR (Pt. 1079) 1, 25 (Adekeye JCA as she then was).
[45] *Bhojwani v Bhojwani* (1995) 7 NWLR (Pt. 407) 349, 370.

rationale that may be deployed in justifying Nigeria's rigid approach to adjudicating matrimonial proceedings, it is recommended that at least in other areas of law, such as property-related matters and international commercial transactions, Nigerian courts should adopt a more flexible approach to domicile.

C. Domicile of Dependence or by Operation of Law

Domicile of dependence is a type of domicile in which a person's domicile is tied to or automatically rests on another person's domicile of origin or choice. Thus, if A's domicile of origin is Ghana, B, whose domicile depends on A's domicile, also has a Ghanaian domicile. If A subsequently moves to Tanzania and acquires a Tanzanian domicile of choice, B, by operation of law, automatically acquires a Tanzanian domicile as well. The rationale for domicile of dependence lies in the idea that such persons do not have the mental capacity (for example children or persons of unsound mind) or are legally prevented from acquiring an independent domicile.

In Nigeria, domicile of dependence usually applies to married women and children. Thus, the domicile of a married woman is that of her husband while the marriage subsists, and a divorced woman retains her former husband's domicile until she acquires a new domicile.[46] Also, a child's domicile is dependent on the domicile of the father at birth, and an adopted child's domicile is dependent on whoever adopts that child.

It is open to debate whether Nigerian law recognises domicile of dependence. Awogu JCA in *Osibamowo v Osibamowo*[47] recognised the domicile of dependence as part of Nigerian law.[48] However, Uwaifo JCA (as he then was) in *Bhojwani v Bhojwani* held a contrary opinion to the effect that

> There are strictly two types of domicil. One is domicil of origin and the other is domicil of choice. There is no separate domicil known as domicil of dependence as was canvassed by Professor Adesanya in the present case and also in *Osibamowo v Osibamowo* (*supra*), and there in that case accepted by this court … The true position is that domicil of origin always depends on circumstances of birth or adoption. It is determined by the status of a child at the time of its birth or adoption … It is this dependence associated with domicil of origin that may have been erroneously thought to be a separate domicil, named domicil of dependence.[49]

Uwaifo JCA's judgment is open to criticism on at least two grounds. First, it is misleading to simply classify a child's domicile of dependence as a domicile of

[46] *Ugo v Ugo* (2008) 5 NWLR (Pt. 1079) 1, 25 (Adekeye JCA as she then was); *Machi v Machi* (1960) LLR 103, 104.

[47] (1991) 3 NWLR (Pt. 117) 85, 93.

[48] See also *Koku v Koku* (1999) 8 NWLR (Pt. 616) 672, 679.

[49] (1995) 7 NWLR (Pt. 407) 349, 364. The appellant's appeal to the Supreme Court was dismissed on the ground that the petitioner was not domiciled in Nigeria. Uwaifo JCA's comments on domicile of dependence were not addressed by the Justices of the Supreme Court.

origin. This is because if the father or adopter's domicile of origin changes (by choice) to another country, the child's domicile by operation of law also changes automatically. This is why it is referred to as a domicile of dependence. Secondly, Uwaifo JCA sought to narrow the domicile of dependence to the domicile of children by holding that what is actually regarded as a child's dependent domicile is actually a domicile of origin through birth or adoption. Uwaifo JCA's judgment excluded other forms of dependent domicile, such as the dependent domicile of a married woman, or persons lacking mental capacity. Surely, the domicile of a married woman cannot be referred to as a domicile of origin, as the domicile of a married woman is dependent on her husband's domicile in Nigeria. If she were not married, her domicile of origin would not necessarily be the same as that of her domicile of dependence (derived from her husband). The same logic applies to domicile of persons lacking mental capacity (as being a domicile of dependence), where the guardian of such persons might not necessarily be their father.

Uwaifo JCA was not the first to refuse the recognition of the existence of a domicile of dependence. Remarkably, there is at least one previous Nigerian case where the domicile of dependence was refused recognition (including the domicile of dependence of a married woman) and classified as a domicile of choice. Onyeama J in the case of *Adeyemi v Adeyemi*[50] approved the statement of Lord Westbury in *Udny v Udny*[51] that 'other domiciles including domicile by operation of law as on marriage, are domiciles of choice'. It is also submitted that this view is misleading for at least two reasons. First, while a domicile of choice can be abandoned, a domicile of dependence cannot be abandoned. Secondly, whereas a domicile of dependence is imposed, a domicile of choice is always acquired.

It may be queried if imposing the domicile of a husband on a married woman is constitutional in view of the provisions of Section 42(1) of the 1999 Nigerian Constitution that prohibits discrimination on the grounds of sex or gender.[52] Writers have criticised this rule as retrogressive and in violation of human rights.[53] This should be an area where Nigerian law should evolve or change in recognising a woman's independent domicile, as is the case in Kenya[54] and South Africa,[55] where an adult married woman is capable of acquiring an independent domicile of choice during marriage.

[50] (1962) LLR 70.

[51] (1869) LR 1 HL Sc 441, 457.

[52] See generally *Salubi v Nwariaku* (1997) 5 NWLR (Pt. 505) 442, 477; *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37; *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA); *Anonde v Mmeka* (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA); *Okonkwo v Okonkwo and Others* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v Ugbene* (2016) LPELR-42110 (CA) 64–67; *Okeke v Okeke* (2017) LPELR-42582 (CA).

[53] IO Agbede, '*Lex Domicilii* in Contemporary Nigeria: A Functional Analysis' (1973) 9 *African Legal Studies* 61, 93; R Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 43.

[54] Law of Domicile Act 1970 s 8(3).

[55] Domicile Act 1992 s 1. In South Africa, dependent domicile of a woman has been completely abolished.

The same logic may also be extended to querying why a child's domicile is solely dependent on that of the father. Perhaps, this rule may be justifiable on the ground that, for practical reasons and legal certainty, a child must have a domicile. Fixing a child's domicile to the father also reflects the African social-cultural context that usually regards the father as the breadwinner of the family. It is, however, suggested (as stated earlier in respect of domicile of origin) that there should be a judicial and a statutory response to relax this rule. The relaxation of this rule is particularly significant in the case of separated or divorced couples. Where it is established that the couple is judicially separated or divorced, the child's domicile should be dependent on the spouse with whom the child is most closely connected, taking into account all the circumstances of the case. This will serve the needs of justice in individual cases.

IV. Proof of Domicile in Matrimonial Proceedings

It was stated earlier that domicile is particularly important in matrimonial proceedings in Nigeria as it goes to the existence of a court's jurisdiction. There are special rules for proving domicile in matrimonial proceedings. Order 5 Rule 3(3) of the Matrimonial Causes Rules 1983 provides that the facts, *but not the evidence* by which the facts are to be proved and which the court is to rely on and utilise, shall be stated in a concise form. However, non-compliance with this rule is an irregularity at the discretion of the judge, who may ask for its compliance; it does not render the proceedings void. Thus, in the case of *Osibamowo v Osibamowo* (above), counsel for the appellant had challenged the petitioner's affidavit that disclosed his intention not to permanently live outside Nigeria; his intention of firmly establishing his business in Nigeria; and his intention to stay with his family members in Nigeria. The appellant's counsel argued that these depositions only established facts of residence and not domicile. In rejecting this argument, the Court of Appeal held that 'at that stage, what was needed was the *facts* and not the *evidence*. At the trial, the *evidence* may be shown not to support *domicile*, and the court will then decline jurisdiction.'[56] The Court, in the alternative, was prepared to hold that even if the appellant did not comply with Order 5 Rule 3(3), it was an irregularity that did not permanently rob the Court of its jurisdiction.

V. Conclusion

Domicile as a connecting factor has considerable significance in Nigerian private international law. However, the use of domicile as a connecting factor is now in

[56] *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt. 117) 85, 92.

decline in national legal systems and international treaties such as those negotiated under the aegis of the Hague Conference on Private International Law.

Historically, domicile is a colonial concept that was deployed by English judges in order for British Nationals stationed in foreign territories at the time to maintain their British status, and not have foreign law apply to them, especially in family law areas such as succession and marriage.[57]

There is now a movement towards the concept of habitual residence as a connecting factor. The seed for the development of habitual residence as a connecting factor was planted at the Hague Conference at the beginning of the twentieth century, principally by jurists from continental European countries. It subsequently gained importance in a significant number of legal systems, and now occupies a special place in the European Union private international law rules. The decline in domicile can be attributed to the artificiality and rigidity of the concept. First, domicile as a connecting factor places a very high bar for establishing the intention of a party to change its domicile of origin to domicile of choice. Second, it holds too rigidly to the domicile of origin such that if a domicile of choice is lost, the domicile of origin is automatically revived. On the other hand, habitual residence is flexible as a connecting factor – it is not particularly defined, and it does not attach considerable significance to the intention of the party – it is relatively easier for a person to establish a change of his or her habitual residence. Secondly, domicile as a connecting factor potentially violates human rights, especially regarding the rules on the domicile of married women and children. Thirdly, in matters regarding a court's jurisdiction, the habitual residence analysis is usually applied to a defendant. Suing a defendant in the jurisdiction where he or she is habitually resident meets the expectations of the parties and creates legal certainty by ensuring foreseeability and predictability in allocating jurisdiction.

Despite the significant advantages habitual residence has over domicile, it is not suggested that the concept should be completely abandoned, as jurisdictions that utilise habitual residence still find a limited place for domicile. Thus, habitual residence has been questioned principally on the basis that the concept lacks a precise definition: how long is a person required to be resident in a place before he or she is regarded as habitually resident? Domicile has an edge over habitual residence in this situation because a person's domicile of origin can change to domicile of choice immediately once he or she sets foot in another country insofar as it can be established that the person has renounced his or her domicile of origin and now intends to have a permanent residence in the new country.

It is recommended that Nigerian judges and legislators should seriously consider reforming the current laws on domicile. This must be done, among other things, to cure the ills of domicile of dependence, including its violation of the

[57] L Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11 *Journal of Private International Law* 317, 321.

human rights of women, and to limit the significance of domicile in Nigerian private international law by giving a special place to a person's habitual residence, especially in civil and commercial matters (encompassing contractual and non-contractual obligations). If the Nigerian legislature is too slow to act, it would take a bold and innovative Nigerian judiciary to intervene.

PART II

Jurisdiction

5

Bases of Jurisdiction

I. Introduction

In Nigeria, the issue of jurisdiction is a very important one. It is the life blood of litigation in Nigeria.[1] There are at least three reasons why this is so. First, the parties or the court (*suo motu*) can raise the issue of jurisdiction at any time, and even before the Supreme Court for the first time. Second, where it is ruled that a court has no jurisdiction, any prior proceedings or resulting judgment, no matter how well-written, is void.[2] Jurisdiction is the gateway to addressing the merits of the parties' case, and therefore must be addressed first (once it is raised) before going into the merits of the case.[3] Third, the issue of the jurisdictional competence of a court to hear a case arises regularly in litigation before Nigerian courts. It is usually utilised as a strategy by Nigerian lawyers to gain procedural advantages. Thus, the time and money spent on the issue of the jurisdictional competence of a court to hear a matter is of immense commercial significance to litigants. Indeed, it is not unusual for parties to settle once the court has answered the question of jurisdiction.

[1] See generally IO Agbede, *Themes on Conflict of Laws* (Ibadan, Shaneson, 1989); O Bamodu, 'Jurisdiction and Applicable Law in Transnational Disputes before Nigerian Courts' (1995) 29(3) *The International Lawyer* 555; O Bamodu, 'In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence' (2011) 7 *Journal of Private International Law* 273; HA Olaniyan, 'Inter-state Service of Process in the Nigeria Federation and the Sheriffs and Civil Process Act' (2012) 38 *Commonwealth Law Bulletin* 69; HA Olaniyan, *Jurisdiction of Nigerian Courts in Causes with Foreign Elements* (Lagos, Lagos University Press, 2013); AO Yekini, 'Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?' (2013) 39 *Commonwealth Law Bulletin* 333.

[2] *Madukolu v Nkemdilim* (1962) 2 SCNLR 341; *Afribank Nigeria Plc v Bonik Industries Ltd* (2006) 5 NWLR (Pt. 973) 300, 310; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 424–27, 437–38; *Ocean Fisheries (Nig) Ltd v Veepe Industries Limited* (2009) 5 NWLR (Pt. 1135) 430, 439; *Ogunde v Gateway Transit Ltd* (2010) 8 NWLR (Pt. 1196) 207; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60, 91; *Theobros Auto-link (Nig) Ltd v Bakely International Auto Engineering Co* (2013) 2 NWLR (Pt. 1338) 337; *Enterprise Bank Ltd v Deaconess Florence Rose Aroso* (2014) 3 NWLR 256, 290; *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA); *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2016) 13 NWLR 206, 240.

[3] *Nahman v Wolowicz* (1993) 3 NWLR (Pt. 282) 443; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 424–27, 435–36; *Ogunde v Gateway Transit Ltd* (2010) 8 NWLR (Pt. 1196) 207. See also *Afribank Nigeria Plc v Bonik Industries Ltd* (2006) 5 NWLR (Pt. 973) 300, 310.

The implication of the above is that jurisdiction is an important concept that judges and practitioners should fully appreciate. Jurisdiction is an area where the law ought to be clear, precise, and consistent in order to make the Nigerian forum attractive for litigation. Regrettably, as demonstrated below, this is not the case – jurisdiction in Nigeria, examined through the lens of conflict of laws, represents a body of law, consisting of erroneous and inconsistent judicial decisions, that potentially makes litigation in Nigeria both complicated and unattractive. This could be attributed to the fact that jurisdiction in Nigeria is subject to varied interpretations and classifications.[4] Also, there is an underlying confluence between constitutional law, conflict of laws, and even principles of equity in addressing the jurisdictional competence of a court to hear a matter.

Despite this confluence, jurisdiction in Nigeria should not be complicated. Jurisdiction, addressed from the lens of conflict of laws, constitutional law, and the principles of equity, does not present any conflicts, but rather, a harmonious state of law.

This chapter is focused on jurisdiction in actions *in personam.* This chapter aims to address some significant questions regarding the concept of jurisdiction in actions *in personam*. First, what is an action *in personam*, as distinct from an action *in rem* in Nigerian conflict of laws? Second, what are the rules for determining jurisdiction in actions *in personam* in Nigerian conflict of laws? Third, how have judicial decisions failed in both appreciating and applying jurisdictional rules on actions *in personam*? The conclusion of this chapter briefly suggests ways of improving this unsatisfactory state of the law on jurisdiction in actions *in personam*.

II. Jurisdiction in Actions *in Personam*

Nigeria is a Federal State, and therefore, conflict of laws issues relating to jurisdiction can arise at both the inter-State and international levels. First, at the inter-State level, the Constitution of Nigeria creates separate High Courts for each of the States, including the Federal Capital Territory. Thus, where there is a dispute as to which of the State High Courts is to exercise jurisdiction to hear a matter, the issue of conflict of laws or private international law arises. This is because, for the purpose of Nigerian conflict of laws, a State within the Nigerian Federation is generally treated as a foreign country to another State within the

[4] *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 577*; Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 435–36; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172, 199; *Eastern Bulkcem Co Ltd v MOS Amobi* (2010) 4 NWLR (Pt. 1184) 381, 398. See also *Afribank Nigeria Plc v Bonik Industries Ltd* (2006) 5 NWLR (Pt. 973) 300; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 1070) 109, 134; *George v SBN Plc* (2009) 5 NWLR (Pt. 1134) 302, 320; *Ogunde v Gateway Transit Ltd* (2010) 8 NWLR (Pt. 1196) 207.

Nigerian Federation.[5] Second, at the international level, where there is a dispute as to whether a Nigerian court or a court of another foreign country is competent to hear a matter, issues of private international law also arise.

The rules on jurisdiction for actions *in personam* are a combination of common law and statutory rules. The former is inherited from the English common law,[6] and the latter are embodied in various legislation. The legislative provisions are contained in the various High Court Civil Procedure rules, which give the Nigerian High Courts, subject to the 1999 Constitution, powers to exercise jurisdiction in the same way it is being exercised by her Majesty's High Court of Justice in England. Some Nigerian courts have construed this as enabling the power to apply English common law conflict of laws rules.[7] There are also statutory provisions that empower the Federal High Court to exercise jurisdiction in actions *in personam*.[8] Although the rules of court in Nigeria do not expressly specify the powers of the court to apply conflict of laws rules, they show steps to follow in effectuating a matter of jurisdiction that involves conflict of laws.[9]

A. Actions *In Personam* versus Actions *In Rem*

The distinction between an action *in personam* and an action *in rem* is significant. For example, Order 2 rule 3(3) of the Admiralty Jurisdiction Rules 1993[10] provides

[5] *NNPC v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 379. However, it is argued here that this rule is inapplicable to defining what 'out of jurisdiction' means for the purpose of determining if the plaintiff requires leave of court for the issue and service of court processes within Nigeria. 'Out of jurisdiction' only means 'out of Nigeria', and not 'out of a State within Nigeria'.

[6] *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100; *Benson v Ashiru* (1967) NMLR 363, 367; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) NCLR 146; *Misr (Nig) Ltd v Yesuf Ibrahim*, High Court of Kano State (Suit No K/65/70, Unreported); *Barzasi v Visinoni Ltd* (1973) NCLR 373, 377; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *NNPC v Anwuta* (2000) 13 NWLR (Pt. 684) 363; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109; *Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[7] *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100 (applying s 9 of the High Court of Lagos Ordinance 1955)*; Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) NCLR 146 (applying ss 10 to 13 of the High Court Law of Lagos Act, Cap 80 Laws of the Federation of Lagos, and Nigeria, 1958); *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195 (applying ss 9–10 of the High Court Law of Bendel State (Civil Procedure Rules), Cap 65 Bendel State Law 1976); *Barsoum v Clemency International* (1999)12 NWLR (Pt. 632) 516, 526 (applying s 10 of the High Court Law of Lagos (Civil Procedure) Rules 1994); *RTC v FOB Investment & Pro Ltd* (2001) 6 NWLR (Pt. 708) 246, 260 (applying s 10 of the High Court Law of Lagos (Civil Procedure Rules), Cap 60 1994); *Herb v Devimco* (2001) 52 WRN 19 (applying s 10 of the High Court Law of Lagos (Civil Procedure) Rules 1994); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109 (applying ss 10 and 11(1)(a) of the High Court Law of Lagos, Cap 60 1994); *Muhammed v Ajingi* (2013) LPELR-20372 (CA) (applying s 13 of the High Court Law of Kano State).

[8] See Admiralty Jurisdiction Act 1991 s 5(1).

[9] *Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516, 528. This is particularly in the area of the court's assumed jurisdiction in an action *in personam* over a defendant that is outside jurisdiction.

[10] It is now Admiralty Jurisdiction Procedure Rules 2011.

that an action *in personam* shall not be commenced in the same way that an action *in rem* is commenced.[11] Thus, the distinction between an action *in personam* and an action *in rem* could also be the key to deciding whether a court is competent to hear a case. The distinction between an action *in personam* and an action *in rem* is not always clear in practice. The use of the label 'action *in personam*' or 'action *in rem*' is by no means decisive as to whether the action was properly initiated with the right procedure.[12] The distinction is founded on the subject matter and procedural aspects of the litigation. An action *in personam* is designed to settle the rights of the parties between themselves. An action *in rem* is one brought in order to vindicate a *jus in rem*.

In *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* ('*Nigerian Ports Authority*'),[13] Coker JSC delivered the leading judgment of the Supreme Court and defined an action *in personam* by stating the following:

> Etymologically an action *in personam* is an action brought against a person, an action to compel him to do a particular thing or to take or not to take a particular course of action or inaction. Actions for damages in tort or for breaches of contract are clearly directed against the person as opposed to actions which are brought for the purpose of declaring or challenging a status, like … an Admiralty action directed against a ship or the *res* (and so known as an action *in rem*) … Generally, therefore, all actions which are aimed at the person requiring him to do or not to do or to take or not to take an action or course of action must be and are actions *in personam.*[14]

In *Anchor Ltd v The Owners of the Ship Eleni*,[15] Foster Sutton FCJ defined 'action *in rem*' as follows:

> An action *in rem* is one in which the subject matter is itself sought to be affected, and in which the claimant is enabled to arrest the ship or other property, and to have it detained, until his claim has been adjudicated upon, or until security by bail has been given for the amount, or for the value of the property proceeded against, where that is less than the amount of the claim.

In *Nigerian Ports Authority*, the plaintiff-appellant instituted an action against the corporate defendant-respondents (whose headquarters were resident within the jurisdiction of the court), seeking a declaration that the ruling of an arbitration board was null and void for holding that the defendant-respondents did not hold assets in a warehouse situated in Warri, outside the court's jurisdiction. The plaintiff-appellant claimed that the defendant-respondents, who carried on the business of forwarding and clearing agents, were the plaintiff-appellants' agents, and also became trustees for the plaintiff-appellants for their profit and

[11] See also *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

[12] *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

[13] (1973) NCLR 146.

[14] See also *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100; *Bronwen Energy Trading Ltd v Oan Overseas Agency Nigeria Ltd* (2014) LPELR-24111(CA) 33–34 (Nimpar JCA).

[15] (1966) 1 NSC 14, 15.

unjust enrichment without accounting to the defendant-respondents. The case was instituted at the High Court of Lagos. The High Court upheld the defendant-respondent's submissions and declined jurisdiction on the basis that the action that occurred in Warri, the then Mid-Western Region,[16] and was an action *in rem* since it also concerned immovable property outside the court's jurisdiction. The Supreme Court overturned the High Court's decision and held that whether an action is *in personam* or *in rem* 'all depends on the type of declaration sought and the intrinsic meaning or nature of the declaration claimed may of itself determine whether the relevant action is one *in personam* or *in rem*'.[17] The Supreme Court then held that, since the plaintiff-appellants were praying the court to compel the defendant-respondents to perform personal obligations of rendering account and making consequential payments to the plaintiff-appellants, the action was one *in personam* and not *in rem*.[18]

In *Rhein- Maas- Und See-Schiffahrtskontor GmbH v Rivway Lines Ltd* ('*Rhein Maas*'),[19] the plaintiff-respondent, a Nigerian company, acted as an agent for the defendant-appellant, a German company, pursuant to a joint venture agreement under which they established a shipping company. Under the agreement, the plaintiff-respondent, as the agent, was entitled to a commission of 1.5 per cent for all inward and outward freight for the shipping vessel. The agreement between the parties was subsequently terminated on mutual terms, accounts were taken, and the plaintiff-respondent made monetary claims against the defendant-appellant in the sum of DM 262,800 for services rendered under the agreement in respect of the vessel. The defendant-appellant challenged the Admiralty jurisdiction of the Federal High Court to hear the matter on the ground that it was statute-barred pursuant to Section 7 of the Limitation Act. The defendant-appellant specifically relied on Section 7(1)(a) and (e), which prohibit the institution of actions founded on simple contract and recovery of money brought after six years from the date of which the cause of action accrued. It was common ground that the action had been instituted after six years. The plaintiff-respondent, however, relied on Section 7(3), which provided that the limitation period shall not apply to any cause of action within the Admiralty jurisdiction which is enforceable *in rem*. The defendant-appellant vigorously contended that the plaintiff-respondent's claim was an action *in personam* and was therefore statute-barred. The plaintiff/appellant, on the contrary, contended that Section 7(3) of the Limitation Act was concerned

[16] Now Delta State.

[17] (1973) NCLR 146, 170.

[18] See also *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 294–97 where the Court of Appeal was correct in holding that an action brought by the plaintiff-respondent against the defendant-appellant for damages – arising from breach of contract of affreightment for delivery of two containers which were shipped on board a vessel from Antwerp, Belgium to Apapa Port, Lagos, Nigeria – was an action *in personam*, as the plaintiff's claim was not concerned with the subject matter of the vessel, but with the personal obligation of the defendant. *Cf Pacers Multi-Dynamics Ltd v The MV 'Dancing Sister'* (2012) 4 NWLR (Pt. 1289) 169.

[19] (1998) 5 NWLR (Pt. 549) 265.

with whether the action was enforceable *in rem* and not whether the procedure adopted was an action *in personam*. The High Court, the Court of Appeal, and the Supreme Court agreed with the plaintiff-respondent's position. Ogwegbu JSC, in his concurring judgment at the Supreme Court, extensively explained the distinction between an action *in rem* and an action *in personam*:

> An action *in rem* is a piece of legal machinery directed against a ship alleged to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. A judgment *in rem* is a judgment good against the whole world. This does not mean that the vessel is the wrongdoer but that it is the means by which the wrongdoer (its owner) has done some wrong to some other party. It is the means by which the wrongdoer is brought before the court as a defendant. It is an accepted legal theory that an action *in rem* is procedural. The purpose is to secure the defendant owner's personal appearance.
>
> An action *in personam* is directed against the person at fault and is dependent entirely upon the plaintiff being able properly and effectively to serve a summons on the defendant in connection with the legal complaint against the defendant particularly when the parties are in different jurisdictions. Therefore, the maritime shipping industry contains within its sphere the concept of legal action available to an injured party through the machinery of the Admiralty jurisdiction which allows, under certain clearly defined circumstances, the vessel to be sued *in rem.* An action *in rem* can be concluded by a judgment *in rem*. The shipowner may take part in the proceedings if he considers it appropriate to defend his property. It is essentially an action against his property (*in rem*) not against him. Thus, it can be seen that the distinction between an action *in rem* and action *in personam* is procedural only. Except in certain claims, the same cause of action may give rise to both actions depending on which action the plaintiff initiates having regard to the procedural difficulties involved.[20]

Based on the above exposition of the law, the Supreme Court reached the conclusion that the action in this case was also enforceable *in rem* and was therefore not statute-barred, despite the fact that the procedure adopted by the plaintiff-respondent was to bring an action *in personam* because the plaintiff-respondent had the option of arresting the ship (which was no longer within the court's jurisdiction) in order to secure the defendant's personal appearance.

In *Deros Maritime Ltd v MV 'MSC Apapa'* ('*Deros Maritime*'),[21] the Court of Appeal distinguished the Supreme Court's decision in *Rhein Mass*. In *Deros Maritime*, the plaintiff sued the vessel and the owner of the vessel in an 'action *in rem*'. The Court of Appeal held that although the vessel sued was resident within the court's jurisdiction, and although the owners sued were resident in Switzerland

[20] *Rhein Mass Und See Schiffahrskontor GmbH v Rivway Lines Ltd* (1998) 5 NWLR (Pt 549) 265, 281. See also *Cemar Shippins Inc v MT 'Cindy Gaia'* (2007) 4 NWLR (Pt. 1024) 222, 242; *MV Breughel v Mondivest Ltd* (2018) LPELR-44728 (CA) 25–27 (Nimpar JCA); *Ancomarine Services Co. Ltd v The MV Sam Purpose (Ex-Tapti)* (2018) LPELR-46763 (CA) 42–48 (Tukur JCA).

[21] (2014) LPELR-22720 (CA).

and the United Kingdom, the action was no longer solely an action *in rem* – it was also an action *in personam*, and the plaintiff was bound to comply with the procedural rules (such as obtaining leave of the court[22]) for bringing the other defendants who were resident outside the court's jurisdiction. The principle that can be deduced from the Court of Appeal's decision is that an action *in rem* solely comes into operation where the vessel or subject matter resident within the court's jurisdiction is sued without joining the vessel's owner, who is resident outside the court's jurisdiction, to the action.[23]

B. Jurisdiction in Actions *In Personam*

A plaintiff may invoke the jurisdiction of the Nigerian court in an action *in personam*, by right and irrespective of where the cause of action arose, in at least two situations. The first is where the defendant is resident or present in Nigeria (or a State in Nigeria in the case of inter-State litigation) and is served with the writ of summons. It is immaterial that the defendant was on a transient visit to Nigeria (or a State in Nigeria) when he or she was served with the writ of summons or that the defendant thereafter departed from Nigeria (or a State in Nigeria).

The second situation is where the defendant waives his or her right to challenge, or voluntarily submits to the jurisdiction of the court. This could be by accepting service and pleading to the merits of the case. It could also be by a jurisdiction agreement with the plaintiff (designating the Nigerian court as the chosen forum).

Another basis upon which the plaintiff can invoke the jurisdiction of the Nigerian court in an action *in personam* is by leave of the court, in circumstances where the defendant is outside the court's jurisdiction. This procedure is not guaranteed by right.[24] This is because the plaintiff, in issuing the writ of summons and serving it, will at least have to seek leave of the court by complying with the relevant High Court Civil Procedure Rules,[25] Federal High Court Civil Procedure Rules,[26] or the Sheriffs and Civil Process Act (the 'SCPA'),[27] as the case may be.

[22] The word 'leave' means the permission obtained from a court to take some action: *Agip (Nig) Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 2) 348, 416.

[23] *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA). See also *MV 'Mustafa' v Afro Asian Impex Ltd* (2002) 14 NWLR (Pt. 787) 395, 411.

[24] *Cf Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[25] For the purposes of private international law, there are about 36 separate High Court Civil Procedure Rules. It is beyond the scope of this work to discuss them extensively. However, the rules are in many respects similar, and the bases for service of a writ on a defendant outside jurisdiction in order to assume jurisdiction are worded uniformly.

[26] Federal High Court (Civil Procedure) Rules 2019. See also Federal High Court Civil Aviation (Procedure) Rules 2013.

[27] Cap S6 LFN 2004. This Act, formerly an ordinance was enacted in 1945. See *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR 434, 458 (Pats-Acholonu JSC).

(i) Residence and Presence

Nigerian courts have jurisdiction over a defendant that is present or resident within their jurisdiction upon service of the writ of summons on the defendant. Thus, in *British Bata Shoe Co Ltd v Melikian* ('*Melikian*'),[28] the Supreme Court of Nigeria held that the High Court of Lagos State was right to have exercised its equitable jurisdiction in an action *in personam* in respect of land situated abroad in Aba, insofar as the defendant was resident within the jurisdiction of the Court. The Kano State High Court, in *Misr (Nig) Ltd v Yesuf Ibrahim*,[29] held that it could exercise jurisdiction in an action *in personam* in relation to a contract wherever made, where the parties are effectively before the court and the defendant has been served with the writ of summons within the jurisdiction of the court. In *Nigerian Ports Authority*,[30] the Supreme Court of Nigeria held that the High Court of Lagos State was competent to exercise jurisdiction in an action *in personam* in respect of land situated abroad, and it was immaterial that the cause of action arose outside the territorial jurisdiction of the High Court of Lagos (Warri), insofar as the defendant was resident within the court's jurisdiction. In *Ndaeyo v Ogunaya*,[31] the Supreme Court of Nigeria held that the High Court of Imo State was wrong to exercise jurisdiction in respect of a tort of detinue occurring within its jurisdiction, where the defendant resided and carried on business outside the jurisdiction of the court.[32] The proper High Courts that could exercise jurisdiction in an action *in personam* in those circumstances were either in Cross Rivers State or Rivers State. In *Ashiru v Barclays Bank of Nigeria*,[33] the Court of Appeal held that the High Court of the Western State of Nigeria was competent to establish jurisdiction in an action *in personam* with regard to claims to declare void a deed of mortgage of immovables situated outside the court's jurisdiction, and to nullify the sale of a mortgaged property in respect of immovable property situated outside the court's jurisdiction, insofar as the parties (including the defendant) were resident within the court's jurisdiction. In *Ogunsola v All Nigeria People's Party*,[34] the Court of Appeal held that the High Court of the Federal Capital Territory, Abuja had jurisdiction, in the eyes of private international law, where the defendants resided or carried on business within its jurisdiction.

This above exposition of the law gives rise to at least two further questions: what does 'residence (or presence) within jurisdiction' and 'carrying on business within jurisdiction' mean for the purposes of assuming jurisdiction over an individual

[28] (1956) 1 FSC 100.
[29] High Court of Kano State (Suit No K/65/70, Unreported).
[30] (1973) NCLR 146.
[31] (1977) 1 SC 11.
[32] The High Court relied on s 22(2) of the High Court Law of Imo State, which provides that the High Court of Imo State shall have jurisdiction in any civil cause (other than contract) if the defendant resides or carries on business within the jurisdiction of the court.
[33] (1975) NCLR 233.
[34] (2003) 9 NWLR (Pt. 826) 462, 482–83.

or a company? Second, is there any significant difference between 'residence' and 'presence' for the purpose of establishing jurisdiction over a defendant? These questions are particularly significant because the presence or residence of a defendant within a jurisdiction dispenses with the need to obtain leave to issue a writ of summons and serve it out of jurisdiction, which is usually meant for a defendant that is 'out of jurisdiction'.[35]

The residence of a legal person is a question of fact.[36] The court usually discovers the residence or presence of the defendant from the originating processes.[37] An individual is said to be resident within the jurisdiction of a court by dwelling at that place for some undetermined period of time, without necessarily intending to make that place a permanent home.[38] This distinguishes the residence of an individual from their physical presence at a place, which is usually transient (such as a short visit or holiday).[39] A defendant may be resident in more than one place for the purpose of a court establishing its jurisdiction.[40]

A company is resident within the jurisdiction of the court where its principal office or headquarters are situated.[41] Where the court finds difficulties in identifying the principal office or headquarters of a company, it should concern itself with where the Board of Directors operates from, the managing director's place of business, or the location of the parent company.[42]

The phrase 'carrying on business' means more than casually dealing with customers that are remote and away from a company's headquarters or head office. There must be something to show that the company truly carries on business within a particular jurisdiction.[43] Thus, for example, a foreign company cannot be regarded as carrying on business within the court's jurisdiction by merely owning share capital in a Nigerian company.[44] Where a foreign company carries on business through an agent or servant company resident within a court's jurisdiction, the principal company is also said to be carrying on business within the same jurisdiction;[45] but where the agent company has no hand in the management of

[35] *National Bank of Nigeria Ltd v John Akinkunmi Shoyoye* (1977) 5 SC 181, 182–83; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *NNPC v Anwuta* (2000) 13 NWLR (Pt. 684) 363; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 482–83. See also *Kida v Ogunmola* (2006) 13 NWLR (Pt. 997) 377, 393.

[36] *University of Nigeria v Orazulike Trading Company* (1989) 5 NWLR (Pt. 119) 19, 26.

[37] *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195.

[38] *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 38; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195, 209; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172.

[39] See generally *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 38.

[40] See also *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195, 209; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172.

[41] *University of Nigeria v Orazulike Trading Company* (1989) 5 NWLR (Pt. 119) 19; *George v SBN Plc* (2009) 5 NWLR (Pt. 1134) 302, 318; *RFG Ltd v Skye Bank Plc* (2013) 4 NWLR 250, 273. See also Companies and Allied Matters Act, Cap 20 LFN 2004 ss 78 and 54.

[42] *University of Nigeria v Orazulike Trading Company* (1989) 5 NWLR (Pt. 119) 19.

[43] *Ezebube v Alpin & Co Ltd* (1966) (2) ALR Comm 97.

[44] *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* (1971) 2 NCLR 121.

[45] *Spiropoulos and Co Ltd v Nigerian Rubber Co Ltd* (1970) NCLR 94. *Cf Eimskip Ltd v Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

the company and receives only the customary agent's commission, the agent's place of business in Nigeria is not the company's place of business. The company has no established place of business in Nigeria and is not resident in Nigeria.[46] However, it should be noted that under Nigerian law, except where exempted on narrowly defined statutory grounds, a foreign company with an intention to carry on business in Nigeria must be incorporated as a separate entity in Nigeria for that purpose. Until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company, and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents of matters preliminary to incorporation.[47] This provision reduces the scope for private international law problems generated in the context of transactions involving foreign companies, especially with issues of jurisdiction. For example, once a foreign company is incorporated as a separate entity in Nigeria, the new entity becomes obviously present or resident in Nigeria and subject to the jurisdiction of the Nigeria courts.

Jurisdiction founded on presence is as good as jurisdiction founded on residence.[48] In *Ayinule v Abimbola*,[49] the defendant, who was ordinarily resident in Ghana, was present and served with a writ in Lagos State, Nigeria for the purpose of restraining him from committing an act in Ghana. The Lagos State High Court, in establishing its jurisdiction over the defendant, held that it was immaterial that the defendant was ordinarily resident in Ghana as 'he was precisely in the same position as a person within the jurisdiction when he was properly served with the writ.'[50]

In *United Bank for Africa v Odimayo* ('*Odimayo*'),[51] the plaintiff-appellant instituted an action in Nigeria to enforce a judgment of the United States District Court of Southern New York against the defendant-respondent. Before judgment was delivered at the High Court, the defendant-respondent entered an unconditional appearance through his counsel and applied for the plaintiff-appellant's writ of summons to be struck out on the basis that the defendant-respondent was not resident within the court's jurisdiction at the time of service (he was in the United Kingdom at the material time), and thus, substituted service could not have been ordered against the defendant-respondent. Also, leave had not been

[46] *In re Gresham Life Assurance Society (Nig) Ltd* 1973 (1) ALR Comm 215, (1973) 1 All NLR (Pt. I) 617, (1973) NCLR 215.

[47] Companies and Allied Matters Act, Cap 20 LFN 2004 s 54.

[48] *Cf* IO Agbede, *Themes on Conflict of Laws* (Ibadan, Shaneson, 1989) 245–47; O Bamodu, 'Jurisdiction and Applicable Law in Transnational Disputes before Nigerian Courts' (1995) 29(3) *The International Lawyer* 555, 558.

[49] (1957) LLR 41.

[50] (1957) LLR 41, 42.

[51] (2005) 2 NWLR (Pt. 909) 21. See also *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Muazu Ahmed v Umaru Yau* (Suit CA/K/21/2000, Nigeria Court of Appeal Judgment delivered on 18 June 2004).

obtained to issue and serve the writ of summons in accordance with the High Court Civil Procedure Rules and the SCPA respectively. The High Court ruled in favour of the defendant-respondent. On appeal, the Court of Appeal overturned the decision of the High Court, holding that although the defendant-respondent was physically outside the court's jurisdiction at the time of service, he nevertheless maintained a presence within the court's jurisdiction. This was because the defendant-respondent simultaneously carried on business within the jurisdiction of the court while he was outside the jurisdiction of the court, and the defendant-respondent had instructed his solicitor via letter to undertake service on his behalf within the jurisdiction of the court.

Odimayo must be distinguished from the Supreme Court's decision in *Kida v Ogunmola* ('*Ogunmola*'),[52] which appears to conflict with it. In *Ogunmola*, the plaintiff-appellant instituted an action for specific performance against the defendant-respondent at the High Court of Bornu State, Maiduguri. The defendant-respondent, at the material time, was outside the court's jurisdiction, having relocated to Ibadan with his family. The plaintiff-appellant applied for leave to serve the defendant-respondent by substituted means at his last abode in Maiduguri. The High Court granted the application. When the defendant-respondent failed to enter an appearance, the High Court entered judgment against him. The defendant-respondent subsequently brought an application to set aside the court's judgment on the basis that leave of the court was not properly obtained to issue the process, and the defendant-respondent was not served in accordance with the rules in the SCPA. The High Court dismissed the application. The Court of Appeal overturned the High Court, and, on further appeal, the Supreme Court upheld the Court of Appeal's decision. The Supreme Court held that the defendant-respondent, who was outside the jurisdiction of the court at the material time, could not be served by substituted means as it did not constitute service. The Supreme Court further held that the defendant could only be served by substituted means as an alternative to personal service where the defendant, who is within the jurisdiction of the court, could not be served personally, because, for example, he was either evading service or could not be found.

The essence of these two cases is the common law principle that an order for substituted service cannot be made where a writ was issued in the ordinary form for service within the jurisdiction against a person who, before the issue of the writ, had left the country and had since remained out of the jurisdiction, and where it did not appear that the defendant had gone out of the jurisdiction to avoid service of the writ. Where a writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service. In *Odimayo*, the service could have been effected because the defendant maintained a presence within the jurisdiction of the court by carrying on business and expressly instructing his counsel to

[52] (2006) 13 NWLR (Pt. 997) 377. See also *Eimskip Ltd v Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

undertake service on his behalf within the court's jurisdiction. The time when he was to be served, and the fact that the defendant was outside the jurisdiction were irrelevant. In *Ogunmola*, there was no way the defendant could be served at the time of service because he was no longer present or resident in the jurisdiction. It was a classic case for service out of jurisdiction, which could not be circumvented by substituted service within the jurisdiction. The cases also illustrate the distinction between the bases of jurisdiction (presence and residence) and the means of service (personal service and substituted service). To establish the jurisdiction of the court, the focus is on the bases of jurisdiction.

The residence or presence of the defendants within the jurisdiction of the court refers to *all* the defendants sued by the plaintiff, so that if the plaintiff sues defendants that are within *and* outside the jurisdiction of the court, then the plaintiff should obtain leave of the court in respect of the defendants that are outside the court's jurisdiction.[53]

(ii) Submission and Waiver

Where the parties voluntarily submit to the jurisdiction of the court, the court has jurisdiction, as the defendant is deemed to have waived his or her objection to the jurisdiction of the court. In *Barzasi v Visinoni*,[54] the plaintiff brought an action at the Kano State High Court against the defendant for compensation due to him arising from a contract of employment. When the plaintiff instituted the action against the defendant, the defendant, through his counsel, unconditionally entered an appearance, contested the claim of the plaintiff, and took substantial steps in the proceedings. The defendant subsequently challenged the jurisdiction of the court on the basis that it was common ground that the place of negotiation, conclusion, and performance of the contract all had connections with Kaduna, which was also the place of business of the defendant, and thus outside the jurisdiction of the High Court of Kano State. The High Court of Kano State, in rejecting the submission of the defendant and assuming its jurisdiction, held that: 'the High Court of Kano State has jurisdiction to try an action relating to a contract wherever made in Nigeria where the parties submit to the jurisdiction of the court'.[55]

In *Ezomo v Oyakhire* ('*Ezomo*'),[56] the defendant, a Senior State Counsel in Enugu State, was sued for libel that occurred within the jurisdiction of the court in the then Bendel State[57] High Court. The defendant entered an unconditional appearance in person and contested the case by filing a statement of defence. The High Court entered judgment against him. On appeal, the Court of Appeal sustained the lower court's decision. On further appeal to the Supreme Court,

[53] *Deros Maritime Ltd v MV 'MSC APAPA'* (2014) LPELR-22720 (CA).
[54] (1973) NCLR 373.
[55] ibid, 380.
[56] (1985) 1 NWLR (Pt. 2) 195.
[57] Now Edo State.

the defendant, for the first time, challenged the jurisdiction of the High Court to hear the case on the basis that service on him in Enugu was irregular for violating Section 99 of the SCPA, and that the proper venue to institute the case was in Enugu, not Auchi, in the then Bendel State. The Supreme Court unanimously held that the failure of the defendant to promptly object to the jurisdiction of the Court when he was served at the Court of first instance was deemed as waiver of the right to object and submission to the jurisdiction of the court.[58]

Similarly, in *Adegoke Motors Ltd v Adesanya* ('*Adegoke Motors*'),[59] the defendant was sued in negligence in the Lagos State High Court and served outside the jurisdiction of the court at Ibadan, Oyo State. The defendant, through its lawyer, entered an appearance to the writ of summons. The plaintiff subsequently filed an application for a summons for judgment. The defendant, despite the service of the summons, did not enter an appearance to contest it. The High Court of Lagos entered judgment for the plaintiff. The defendant then applied to the court to set aside the judgment in default of defence. The application was unsuccessful. At the High Court, no challenge was made to the jurisdiction of the Court. At the Court of Appeal, the defendant-appellant, for the first time, challenged the jurisdiction of the High Court on the basis that the writ of summons was void, as the service of the court process on the defendant was outside the jurisdiction of the court, and thus failed to comply with Sections 97 and 99 of the SCPA. The Court of Appeal dismissed his application. On appeal to the Supreme Court, the Supreme Court followed its decision in *Ezomo* and held that the failure of the defendant to promptly challenge the jurisdiction of the High Court meant that he had waived his right by submitting to the court's jurisdiction.[60]

In *Odua Investment Co Ltd v Talabi* ('*Odua*'),[61] the defendant was sued in respect of a contract of employment in the Lagos State High Court and served outside the jurisdiction of the court in Ibadan, Oyo State. The defendant, through his counsel, entered an appearance and provided an address for service within the jurisdiction of the court. The defendant took steps in the proceedings until the action was slated for trial, upon which the defendant challenged the jurisdiction of the trial court on the basis that leave of the court was not sought to issue the court process in accordance with Order 2 rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972, and that service of the court processes violated Section 97 and 99 of the SCPA. The High Court dismissed the objection on the basis that the defendant had waived his right to challenge the court's jurisdiction. The defendant's appeal to the Court of Appeal was dismissed. On appeal to the

[58] It is submitted that this aspect of the judgment is judicial *dicta* because the Supreme Court principally held that the defendant's address for service was within the jurisdiction of the court even though he was served in Enugu State outside the jurisdiction of the Court. In other words, there was no need to serve the defendant out of the jurisdiction of the court.

[59] (1989) 3 NWLR (Pt. 107) 250.

[60] See also *Akhigbe v Paulosa (Nigeria) Ltd* (2006) LPELR-7573 (CA).

[61] (1997) 10 NWLR (Pt. 523) 1.

Supreme Court, the Supreme Court followed its decisions in *Ezomo* and *Adegoke Motors*, holding that the defendant had waived his right to challenge the jurisdiction of the court by not taking timely steps to do so at the High Court.[62]

In *United Bank for Africa Plc v Odimayo*,[63] another basis upon which the Court of Appeal reached its decision was that the defendant, who entered an unconditional appearance having taken steps in the proceedings through his counsel, was deemed to have submitted to the jurisdiction of the court.

Submission does not only take the form of entry of an appearance by the defendant or through his or her counsel via a memorandum of appearance (as observed above). It can also take the form of a jurisdiction agreement designating a Nigerian court.[64]

For submission to be voluntary and effective in giving the court jurisdiction, appearance before the jurisdiction of the court has to be unconditional, such as filing a statement of defence to contest the case on the merits.[65] Thus, where a defendant enters a conditional appearance through his or her counsel in protest to the jurisdiction of the court, submission cannot be regarded as voluntary and effective in giving the court jurisdiction.[66] The defendant, in such a circumstance, cannot be regarded as having waived its right to object to the jurisdiction of the court. In addition, the failure of the defendant to enter an appearance (in order to challenge the court's jurisdiction) after being served with court processes cannot be regarded as submission. It may be an impolite way of challenging the court's jurisdiction, but it is not submission (or waiver of the right to object) to the court's jurisdiction.

In *Muhammed v Ajingi* ('*Ajingi*'),[67] the plaintiff instituted a claim against the defendant in the Kano State High Court for summary judgment under the undefended list procedure, in accordance with the rules of the court. The defendant failed to enter an appearance despite the service of originating processes by the plaintiff. The Kano State High Court, satisfied that the defendant was duly served, entered judgment for the plaintiff. The defendant then brought a motion before the court to set aside the judgment on two grounds: first, the plaintiff had not complied with the rules of the court, in obtaining the leave of court to serve the writ of summons and originating processes out of jurisdiction, and second, the plaintiff's suit was in violation of choice of venue rules for instituting actions.[68] The Kano State High

[62] See also *Olly v Tunji* (2012) LPELR-7911(CA) 68–70 (Ogunwumiju JCA); *Suberu v African Continental Bank & Ors* (2002) LPELR-12207(CA) 304–5 (Adamu JCA).

[63] (2005) 2 NWLR (Pt. 909) 21.

[64] *Grisby v Jubwe* (1952–1955) 14 WACA 637.

[65] *Enterprise Bank Ltd v Deaconess Florence Rose Aroso* (2014) 3 NWLR 256, 294–5.

[66] *Holman Bros (Nig) Ltd v Kigo Brothers (Nig) Ltd* (1980) 8–11 SC 44; *Mako v Umoh* (2010) 8 NWLR (Pt. 1159) 82. *Cf Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 493–4.

[67] (2013) LPELR-20372 (CA).

[68] The Court of Appeal rightly observed that references to choice of venue rules were inappropriate by both counsels in this case as it concerned inter-state litigation. The Court of Appeal further held that reliance should have been placed on the provisions of the SCPA (not the rules of court), since what was engaged in this case was assumed jurisdiction in Nigerian private international law.

Court, in a considered ruling, dismissed the defendant's case. On appeal, the Court of Appeal dismissed the defendant's case. Relying on the Supreme Court's decision in *Odua*, the Court of Appeal held that since it was established that the defendant had been duly notified of the proceedings and had failed to enter an appearance, its action amounted to waiver and submission to the jurisdiction of the court by not taking prompt steps to challenge the non-compliance of the plaintiff in obtaining the leave of the court to serve the writ out of jurisdiction.

With due respect, the Court of Appeal's decision was wrongly decided, and reference to *Odua* was inappropriate in this regard. In *Odua*, the defendant entered an appearance, took substantial steps in the proceedings, and did not challenge the court's jurisdiction until the proceeding was slated for judgment. This amounted to submission to the court's jurisdiction. In *Ajingi*, the defendant failed to enter an appearance until judgment was made against it. Its entry of appearance was aimed at challenging the jurisdiction of the High Court in a bid to set aside its judgment. The approach of the defendant in this case may be impolite to the court or unduly technical (as observed by Abiru JCA), because the preferable approach would be to enter a conditional appearance and then challenge the court's jurisdiction; the failure to enter an appearance before the judgment was given did not amount to submission.[69]

The rule that submission gives the court powers to establish jurisdiction in an action *in personam* is not absolute. Where the court is prohibited from exercising jurisdiction by the Constitution, a statutory enactment, or the rules of court, neither the agreement nor consent of the parties to submit or waive objection to the jurisdiction of the court can confer jurisdiction on the court.[70] Thus, a State High Court cannot exercise jurisdiction in an action *in personam* in respect of an Admiralty matter reserved for the Federal High Court.[71] This is irrespective of whether the parties waive objection to the jurisdiction of the court, as it could be raised by any of the parties for the first time on appeal, or even *suo motu* by the court.

There are a significant number of conflicting decisions on the concept of assumed jurisdiction in Nigerian conflict of laws, which will subsequently

[69] It is submitted that the right approach in this case would be to consider the provisions of s 101 of the SCPA, which gives the High Court powers to determine if it could exercise jurisdiction in this case.

[70] *Swiss Air Transport Company Ltd v African Continental Bank Ltd* (1971) NCLR 213; *Barzasi v Visinoni Ltd* (1973) NCLR 373. Some Nigerian courts, however, have on some occasions stated the position too widely – that parties, by their consent or agreement, cannot confer jurisdiction on the court. In this regard, they failed to distinguish situations where the *existence* of the court's jurisdiction is mandatorily prohibited by the Constitution or statute, from situations where the parties, by agreement, confer on the court the *exercise* of its jurisdiction where the court is not mandatorily prohibited from establishing its jurisdiction. These judicial statements are only correct in respect of the former scenario, and not the latter scenario. *Cf Nahman v Allan Wolowicz* (1993) 3 NWLR (Pt. 282) 443, 455; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 640) 99, 130; *Shell Petroleum Development Company of Nigeria Limited v Esowe* (2008) 4 NWLR (Pt. 1076) 72, 90; *George v SBN Plc* (2009) 5 NWLR (Pt. 1134) 302, 318; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR 60, 91.

[71] Constitution of the Federal Republic of Nigeria 1999 s 251(1)(g).

be addressed. Where a plaintiff fails to comply with the SCPA or rules of court by not seeking leave of the court to issue and serve a writ on a defendant that is outside the court's jurisdiction, and the defendant submits to the court's jurisdiction by waiving his or her right to promptly challenge the court's jurisdiction, the question of whether submission or waiver could confer jurisdiction on the court depends on how each court has categorised the requirement. This categorisation is divided into two main parts. Where the court interprets or regards the statute or rule of court as mandatory, failure to comply with such requirements renders the proceedings void, and the defendant's submission or waiver to the jurisdiction of the court is of no effect. On the other hand, where the court interprets or regards the statute as directory (and not mandatory), the failure of the plaintiff to comply with such requirements is voidable at the instance of the defendant, who must take prompt steps to challenge the court's jurisdiction, as delay on the part of the defendant will be construed as submission or waiver of the right to object to the jurisdiction of the court.

At this juncture, the authors submit that this controversy has been created by some Nigerian courts that have failed to appreciate the distinction between procedural jurisdiction and substantive jurisdiction in Nigerian conflict of laws. The right to contest substantive jurisdiction is not capable of waiver as it is mandatory, but the right to contest procedural jurisdiction is capable of being waived by the defendant.[72] Thus, if a Nigerian court's jurisdiction is properly conferred by the Constitution or an enabling statute, but the plaintiff fails to seek leave of the court in serving the foreign defendant out of jurisdiction in international litigation, the plaintiff's case does not fall within one of the grounds where leave can be granted to serve the defendant out of jurisdiction in international litigation. Alternatively, the plaintiff does not comply with the SCPA in serving a defendant in another State in a matter of inter-State litigation. The right to object to these irregularities is capable of being waived if the defendant submits to the jurisdiction of the court or does not promptly challenge the jurisdiction of the court by taking steps in the proceedings.

(iii) Assumed Jurisdiction

The term 'assumed jurisdiction' refers to the powers of the Nigerian court to establish its jurisdiction in an action *in personam* over a defendant that is outside the jurisdiction of the court through service of a writ of summons abroad.[73]

[72] See generally *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1; *Jikantoro v Alhaji Dantoro* (2004) 5 SC (Pt. II) 1, 21. This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail* (2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23–25; *Nigerian National Petroleum Corporation v Zaria* (2014) LPELR-22362 (CA) 58–60; *Obasanjo Farms (Nig) Ltd v Muhammad* (2016) LPELR-40199 (CA).

[73] *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532, 539; *Muhammed v Ajingi* (2013) LPELR-20372(CA). See also *Nahman v Allan Wolowicz* (1993) 3 NWLR (Pt. 282) 443.

In *Nwabueze v Okoye*,[74] the Supreme Court of Nigeria brilliantly captured the fundamental basis of 'assumed jurisdiction' in Nigerian conflict of laws by stating the following:

> Generally courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … It should be noted that except where there is submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. *The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute* (emphasis added).[75]

Assumed jurisdiction in actions *in personam* will be discussed under four sub-headings which deal with: (a) the applicability of the State High Court Civil Procedure Rules, the Federal High Court Civil Procedure Rules, and the SCPA regarding leave to issue and serve a defendant out of jurisdiction of the State High Court and Federal High Court; (b) compliance with leave of the court to issue and serve a writ out of jurisdiction; (c) compliance with the SCPA on service of writ of summons out of a State High Court within Nigeria; and (d) consequences of non-compliance with relevant rules.

(a) The Meaning of 'Out of Jurisdiction'

The statutory basis of a court's assumed jurisdiction is dependent on the powers of the court to order the issue of court processes and serve the processes on the defendant that is outside their jurisdiction.[76] The issue and service of court processes, though interrelated in civil litigation, are distinct.[77] Nigerian appellate courts have recognised the difference between the issuance of a writ of summons and its service, and held that the issuance of a writ of summons may be valid while its service may be defective, and vice versa.[78] The issue of court processes is governed by the High Court and Federal Court Civil Procedure Rules, while the service of court processes within Nigeria is governed by the SCPA.[79]

[74] (1988) 4 NWLR (Pt 91) 664.

[75] See also *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 40.

[76] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664.

[77] *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 270; *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182, 206; *Mako v Umoh* (2010) 8 NWLR (Pt. 1195) 82, 108; *Agip (Nig) Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 2) 348; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1, 21–22; *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 288–290.

[78] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250; *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182; *United Bank for Africa Plc v Ademola* (2009) 8 NWLR (Pt. 1142) 113; *Agip (Nig) Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 2) 348; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1; *Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[79] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 286; *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1; *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363; *Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 490–91.

These enactments on the issuance of a writ of summons and service of the writ of summons outside the jurisdiction of the court, though distinct, are meant to be complementary and not contradictory.[80]

The issuance of a writ of summons and service of the writ of summons out of the jurisdiction of the court both require leave of the court.[81] This raises a very important question: in Nigerian private international law, what does 'out of jurisdiction' mean for the purpose of seeking the leave of court to issue the writ of summons and serve it? Does it mean 'out of a State within Nigeria'? Or, does it mean 'out of Nigeria'? It is important to resolve this question at this stage because, as stated earlier, where a defendant is within the jurisdiction of the court, the court can exercise jurisdiction in an action *in personam* and the requirement for leave to issue and serve the process out of the jurisdiction of the court is otiose. This issue is addressed from two perspectives, namely inter-State and international.

1. Inter-State

At the inter-State level, Nigerian appellate courts have taken two principal positions on the meaning of 'out of jurisdiction' for the purpose of obtaining leave to issue and serve court processes outside the State High Court.[82] The first is that 'out of jurisdiction' means 'out of a State within Nigeria'. This position is the prevalent viewpoint. Thus, there are a significant number of cases from the Supreme Court that regard the law as established, that where a defendant is outside of a State within Nigeria, leave of the court should be obtained to issue and serve the writ of summons outside the jurisdiction of the State High Court.[83] This position can also be justified on the basis that in Nigerian conflict of laws, a State is generally regarded as a 'foreign country' to another State within Nigeria.

The second viewpoint is that 'out of jurisdiction' means 'out of Nigeria'. This view has fewer proponents than the first.[84] The rationale for this position is that

[80] *Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[81] See also *Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[82] This is on the assumption that the rules of Court are silent on what 'out of jurisdiction' means. This is because some statutory provisions (by contrast) clearly specify that 'out of jurisdiction' means 'out of Nigeria', such as Order 8 of the Lagos State High Court (Civil Procedure) Rules 2012; Order 10 of the Lagos State High Court (Civil Procedure) Rules 2019; Order 8 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018. In this respect, see the cases of *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363 (construing Order 5 rule 6 and Order 12 rule 14 of the High Court of Rivers State (Civil Procedure) Rules, 1987); *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2016) 13 NWLR (Pt. 1529) 206, 247–48 (construing Order 5 rule 18 and Order 7 rule 19 of the High Court of Anambra State (Civil Procedure) Rules, 1988).

[83] See for example *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *NEPA v Onah* (1997) 1 NWLR (Pt. 484) 680; *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1; *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388.

[84] *John Ukoh v Godwin Akatu* (1974) 4 ECSLR 202 (Oputa J as he then was); *Nigerian Merchant Bank v Bay & Jalie* (1986) 2 QLRN 24 (Oguntade J as he then was); *Nwabueze v Okoye* (1985)

the SCPA exclusively regulates the mode and requirements for service outside a State but within Nigeria, and the SCPA makes no reference whatsoever to procurement of leave of the Judge or Court to issue a writ for service 'out of a State, within Nigeria'; the rules of court (and not the SCPA), however, does so with respect to writs for service 'out of Nigeria'.[85] Second, when the provisions of the relevant rules of court are critically examined, it is observed that

> there are several things that the Judge has to consider first. There are protocols to observe, considering that we are about to deal with sovereigns in the true sense of the term. No such considerations are necessary when we are referring to people in states other than the one in which the writ is to issue.[86]

It is submitted that this minority view is what the law *ought* to be in Nigeria. This position is supported by the provisions of Sections 96 (2) and 103(2) of the SCPA. Section 96 provides that:

> (1) A writ of summons issued out of or requiring the defendant to appear at court of a State or the Capital Territory may be served on the defendant in any other State or the Capital Territory.
> (2) Such service may, subject to any rules of court which may be made under this Act, be effected in the same manner *as* if the writ was served on the defendant in the State or the Capital Territory in which the writ was issued.

Section 103(2) then provides that

> [s]uch service may, subject to any rules of court which may be made under this Part, be effected in the same way, and shall have the same force and effect, as if the service were effected in the State or the Capital Territory in which the process was issued.

Oguntade JCA (as he then was), in his leading judgment (with whom other Justices of the Court of Appeal agreed) in *Nwabueze v Okoye*,[87] rightly observed thus:

> I am satisfied that the clear meaning of section 96(1) and (2) is that the defendants residing outside a state but within the federation are to be treated for the purpose of service of a writ of summons as if they were resident in the state where the writ of summons was issued. This provision clearly sweeps away the concept of jurisdiction of State High Court for the purpose of service. The appellants in this case although they resided in Lagos are to be treated as if they lived in Anambra State. The question

1 NWLR (Pt. 21) 185 (Oguntade JCA as he then was) – overturned by the Supreme Court in *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 379–80. For interesting academic commentary see also HA Olaniyan, 'Inter-state Service of Process in the Nigeria Federation and the Sheriffs and Civil Process Act' (2012) 38(1) *Commonwealth Law Bulletin* 69.

[85] *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 379–80.

[86] *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 380. Ikongbeh JCA is indeed correct in this regard, as the provisions that accompany 'service out of jurisdiction' in the Nigerian High and Federal High Court Civil Procedure Rules relate to service in a foreign country.

[87] (1985) 1 NWLR (Pt. 21) 185. Unfortunately, this decision was overturned by the Supreme Court in *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664.

> of service outside jurisdiction does not arise and there is therefore no more a need to invoke Order 2 rule 4 of RSC 1960.[88]

Also, Ikongbeh JCA, in *Nigerian National Petroleum Corporation v Anwuta*,[89] rightly observed that the use of 'as if' in Sections 96(2) and 103(2) implied a statutory fiction[90] created by the National Assembly to dissolve State boundary lines for the sole purpose of creating one jurisdiction for service of a writ within Nigeria. Ikongbeh JCA explained the position in lucid terms:

> Ordinarily, because of the autonomy of each state under the constitution, the processes and judgments of each state high court are, as far as the courts of other states are concerned, processes and judgments of a foreign court and ought to be viewed and treated as such. Yet since we the people of this Federal Republic have firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation, let us create a statutory fiction. Let us, at least, for purpose of service of process within the country ignore the true position of things. Let us not treat the processes of the courts of one state as the processes of a foreign court, at least, just for the purpose of service. Let us serve them in the other states pretending that they have been issued in those other states. Let us carry out this make believe in recognition of our firm and solemn resolve to live together as one people instead of as different peoples, which the reality will show us to be.[91]

Section 102 further affirms this position by providing that the SCPA

> does not confer on any court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear or determine if the writ of summons had been served within the State or the Capital Territory in which the writ was issued.

This provision confirms that the extra-territorial jurisdiction of the Nigerian courts to assume jurisdiction over a defendant within Nigeria dispenses with the need for leave to issue and/or serve the writ of summons out of jurisdiction. In other words, the distinction between issuance and service of a writ is immaterial in inter-State matters, insofar as it concerns leave to issue and service of the writ of summons out of a State within Nigeria. The SCPA dispenses with that requirement of leave within Nigeria. Furthermore, because the SCPA is a piece of legislation competently enacted by the National Assembly,[92] the rules of the State High Court

[88] *Nwabueze v Okoye* (1985) 1 NWLR (Pt. 21) 185, 190.

[89] (2000) 13 NWLR (Pt. 684) 363.

[90] See generally *Savannah Bank v Ajilo* (1987) 2 NWLR (Pt. 57) 421, 430–1; (1989) 2 NWLR (Pt. 97) 305, 324–5 on the import of 'as if' as a statutory fiction.

[91] *NNPC v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 379.

[92] See generally s 4 of both the 1979 and 1999 Constitution. Matters of service and execution of court processes fall within the exclusive legislative list as provided in Item 57 of the exclusive legislative list, as specified in Part 1 of the Second Schedule to the 1999 Constitution (previously item 56 of the 1979 Constitution). See *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363, 376. See also the *dictum* of Agbaje JSC in *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 286; *Nwabueze v Okoye* (2002) 10 WRN 123, 151–52 (Agbaje JSC); *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt. 203) 323, 333.

cannot be interpreted as if they override an Act of the National Assembly.[93] Such a position is unconstitutional. Thus, the position taken here is that for the purpose of obtaining leave to issue and serve a writ, 'out of jurisdiction' means 'out of Nigeria' in a State High Court.

In a case between one division of the Federal High Court and another, the principle of conflict of laws simply does not apply. Constitutionally, there is only one Federal High Court in Nigeria.[94] The Federal High Court is one court in Nigeria with different judicial divisions created for geographical and administrative convenience.[95] In addition, the relevant rules of the Federal High Court provide that, for the purpose of service of a writ of summons, the whole of the Federation is within the jurisdiction of the court.[96] In other words, no geographical barrier exists, with regard to leave to issue and serve processes, within the Nigerian Federation where the Federal High Court exercises jurisdiction. Therefore, it is submitted that in the Federal High Court, 'out of jurisdiction' can only mean 'out of Nigeria'.[97]

Unlike the situation in the State High Court, where there is a statutorily enacted legal fiction in the SCPA to break the existing geographical boundaries for the purpose of obtaining leave to issue and serve a writ within the Nigerian Federation, there is simply no need to request leave to serve a writ of summons from one *judicial division* of the Federal High Court in the jurisdiction of another judicial division of the Federal High Court within one Nigerian Federation. Such an interpretation overlooks the principles of private international law applicable in a Federal Constitution which Nigeria operates. It is on this basis that the Supreme Court wrongly decided *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* ('*MV* "*Arabella*"').[98] In this case, the court set aside (applying the provisions of Order 10 rule 14 of the Federal High Court (Civil Procedure) Rules, 1976) a writ of summons that was issued and served out of the jurisdiction

[93] *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363; *Nigerian Merchant Bank v Bay & Jalie* (1986) 2 QLRN 24. See also *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 430. *Cf Muhammed v Ajingi* (2013) LPELR-20372 (CA) where the Court of Appeal held the provisions of the SCPA do not supersede or conflict with the rules of court; they are both complementary.

[94] Section 249 provides that there shall be *a* Federal High Court, and relates to the whole of Nigeria. In comparison, ss 255 and 272 of the 1999 Constitution provide respectively that there shall be a High Court of the Federal Capital Territory and each State of the Federation.

[95] Federal High Court Act, Cap 407 LFN 1990 s 19. *Abiola v Federal Republic of Nigeria* (1995) 3 NWLR (Pt. 382) 203; *SDP v Biem*, SC 341/2019 (unreported). See also *George v SBN Plc* (2009) 5 NWLR (Pt. 1134) 302.

[96] See Order 6 rule 5 of the Federal High Court (Civil Procedure) Rules 2000; and Order 6 rule 31(2) of the Federal High Court (Civil Procedure) Rules 2019. See also Order 6 rule 31 of the Federal High Court (Civil Procedure) Rules 2009.

[97] Order 6 rule 31(1) of the Federal High Court (Civil Procedure) Rules 2019 provides that 'Out of Jurisdiction' means out of the Federal Republic of Nigeria. Order 6 rule 31 of the Federal High Court (Civil Procedure) Rules 2009, and Order 13 rule 31 of the Federal High Court (Civil Procedure) Rules 2000 also provides that 'Out of Jurisdiction' means out of the Federal Republic of Nigeria.

[98] (2008) 11 NWLR (Pt. 1097) 182.

of the Lagos Federal High Court on a defendant resident in Abuja (the Federal Capital Territory) without the leave of court.[99] The appellant had correctly argued that the Federal High Court in Lagos ordinarily has jurisdiction (subject to choice of venue rules) over a defendant resident in Abuja without the need for leave of the court.

Fortunately, the Supreme Court recently reverted to the right principle when it held in *Akeredolu v Abraham* ('*Akeredolu*')[100] that it is not a requirement in proceedings before the Federal High Court to obtain leave to serve proceedings from one State in Nigeria to another. Okoro JSC in the leading judgment held that:

> In respect of processes issued in the Federal High Court to be served on a defendant at an address in any State of the Federation or of the Federal Capital Territory, it is one to be served within the territorial jurisdiction of the Federal High Court which comprises all the 36 States and the Federal Capital Territory as set out by the Constitution of the Federal Republic of Nigeria 1999 (as amended). What I am endeavouring to say is that the territorial boundaries of the Federation of Nigeria are the limits of the territorial jurisdiction of the Federal High Court as its processes apply as a matter of law throughout the country as the processes of a single Court issued within jurisdiction. Thus, all its processes including the initiating processes such as writ of summons are to be regulated and governed by the Rules made by the Chief Judge to regulate the practice and procedure in the Court pursuant to the powers vested in him by Section 254 of the Constitution.[101]

Aka'ahs JSC in his concurring judgment held that:

> In the present case the originating processes were issued under the Federal High Court (Civil Procedure) Rules 2009 whose jurisdiction covers the entire country and the various divisions of the Court are for administrative convenience only. Section 19(1) of the Federal High Court Act provides as follows: '19(1) The Court shall have and exercise jurisdiction throughout the Federation and for that purpose the whole area of the Federation shall be divided by the Chief Judge into such number of Judicial Divisions or part thereof by such name as he may think fit.' Also Order 6 Rule 31 of the Federal High Court (Civil Procedure) Rules 2009 defines 'Out of jurisdiction' to mean out of the Federal Republic of Nigeria.[102]

Galnije JSC in his concurring judgment also held that:

> By virtue of Section 19 of the Federal High Court Act and Order 6 Rule 31 of the Federal High Court (Civil Procedure) Rules 2009, the Federal High Court has jurisdiction throughout the Federation and service out of jurisdiction is defined as out of the Federal Republic of Nigeria. Owo in Ondo State is within Nigeria and therefore within the jurisdiction of the Federal High Court sitting in Abuja.[103]

[99] ibid, 205. See also the case of *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 288–90 where the Court of Appeal, with due respect, fell into the same error in construing Order 6 rule 12(1) of the Federal High Court (Civil Procedure) Rules 2000.

[100] (2018) LPELR-44067 (SC) 57.

[101] ibid, 39–40.

[102] ibid, 57.

[103] ibid, 59.

The Supreme Court in *Akeredolu* did not *explicitly* overrule *MV 'Arabella'* and the line of cases following that decision. The best course of action would have been for the Supreme Court to constitute a full panel and explicitly overrule its decision in *MV 'Arabella'* and the line of cases that followed. In this connection, given the current decision in *Akeredolu*, *MV 'Arabella'* and the line of cases following that decision are no longer good law.

The SCPA does not apply to the Federal High Court. A joint reading of Sections 2, 19(1) and 95(1) of the SCPA clearly corroborates the idea that 'court' includes the High Court and Magistrate Court. It further provides that 'High Court' means 'the High Court of the Federal Capital Territory Abuja or of the State'. The exclusion of the Federal High Court from the list of courts to which the SCPA applies is deliberate. It takes into account the application of private international law in a Federal Constitution like Nigeria. In other words, the requirements to be complied with in the SCPA while serving a court process outside the State of issue do not apply to the Federal High Court.[104] It is for this reason that we respectfully submit that the Supreme Court's decision in *MV 'Arabella'*[105] was wrongly decided for holding that the SCPA applies to the Federal High Court.[106] In *MV 'Arabella'*, Akintan JSC, after considering Section 19(1), held in a concurring judgment that:

> It is not in doubt that the provisions of … the Act [SCPA] are applicable in all High Courts including the Federal High Court. The said provisions, in my view, have nothing to do with the coverage of jurisdiction of the Federal High Court, which is nationwide. It is therefore a total misconception to believe that the provisions of the section are inapplicable to the Federal High Court because the jurisdiction of that Court covers the entire nation.[107]

In *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA*,[108] the Court of Appeal (Okoro JCA as he then was), sought to justify the Supreme Court's decision in *MV 'Arabella'* on the basis that 'the Federal High Court is no doubt a High Court. The appellation "Federal" does not make the court any other court than a High Court'. It is respectfully submitted that even though the Federal High Court is equivalent to the State High Court in the sense that both courts have coordinate jurisdiction, it is erroneous to equate that logic to imply that the SCPA, which applies to the State High Court, also applies to the Federal High Court. The logic is unsound – it is tantamount to saying that the SCPA also applies between judicial divisions of the

[104] See generally ss 96–103 of the SCPA.

[105] *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182.

[106] See also *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 291–92; *Central Bank of Nigeria v Interstella Communications Ltd* (2018) 7 NWLR (Pt. 1618) 294, 326–27; *Izeze v Independent National Electoral Commission* (2018) 12 NWLR (Pt. 1629) 110; *Peoples Democratic Party v Independent National Electoral Commission* (2018) 12 NWLR (Pt. 1634) 533.

[107] *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182, 220–21.

[108] (2011) 4 NWLR (Pt. 1236) 1.

State High Court, which cannot be the case. Again, at the expense of being prolix, such reasoning overlooks the principles of private international law applicable in a Federal Constitution.

Fortunately, very recently, in *Social Democratic Party v Biem* ('*Biem*')[109] the Supreme Court applied the law correctly to the effect that the SCPA does not apply to the Federal High Court.[110] Aka'ahs JSC, delivering the leading judgment of the Supreme Court, held that:

> The submission by learned counsels for the 1st respondent/cross-appellant that the principal legislation that deals with service of court processes of any court in Nigeria is the Sheriffs and Civil Processes Act is therefore not correct as it relates to the Federal High Court. It is only true of the State High Courts and the FCT High Court because their jurisdiction is circumscribed by the territory each State occupies and the Federal Capital Territory.[111]

In summation, in respect of the interpretation of statutory provisions for leave and service in inter-state litigation in Nigeria, it is useful for Nigerian courts to note at least two important points. First, the main rationale for imposing the requirement of leave to issue and serve a defendant that is outside the court's jurisdiction is to ensure that a defendant does not take the trouble to defend a frivolous suit, or one which the forum does not have a sufficient connection with. This is particularly significant for a defendant who resides in a foreign country and is not ordinarily subject to the jurisdiction of the court. Comity requires the Nigerian court to be careful to ensure that it does not subject such a foreign defendant to the Nigerian forum where it has no connection with the suit, or the suit is frivolous or vexatious. In the context of inter-State litigation, a compromise is struck based on these guiding principles to accommodate Nigeria as a Federal Constitution. The SCPA dispenses with the need to obtain the leave of the court in inter-State litigation, which is not actually meant for foreign defendants in the true sense of the word 'foreign'. However, taking into account Nigeria's Federal status, the SCPA requires certain conditions (Sections 96–99) to be fulfilled in serving a defendant that is outside the jurisdiction of a State High Court.

Second, when we look comparatively, Nigeria's SCPA is also similar to the Australian Service and Execution of Process Act 1992. Section 8(4)(a) and (b) of the Australian Service and Execution of Process Act provides that for the relevant State, the operation of another State's laws on the service or execution of the relevant State's court processes is excluded, and vice versa. This provision has also been construed to dispense with the requirement for leave to serve processes between State High Courts within the Australian Federation.[112] This is also what the Nigerian SCPA does by implication as Federal legislation (on the exclusive

[109] *Social Democratic Party v Biem* SC 341/2019 (unreported).
[110] ibid.
[111] ibid, 42–43.
[112] See generally R Mortensen 'The Trans-Tasman Judicial Area and the Choice of Court Convention' (2009) 5 *Journal of Private International Law* 213.

legislative list) that is superior to the State High Court Civil Procedure Rules.[113] In this respect, the Australian model is of more relevance to Nigeria than English decisions because Australia is a Commonwealth jurisdiction that operates a Federal Constitution like Nigeria.

2. International

At the international level, it is submitted that the position should be reliance on the Federal and State High Court Civil Procedure Rules for the purpose of obtaining leave to issue and serve a writ of summons out of the jurisdiction of the court. The SCPA does not apply to the international situation for the purpose of leave to issue and serve a writ. The SCPA clearly states in its long title that its purpose is to legislate for 'the service and execution of civil process throughout Nigeria'. Nigerian appellate courts (including the Supreme Court) also take it as established that the SCPA applies to service of a writ on the defendant that resides outside a State but *within Nigeria*.[114] It is, therefore, surprising that the Court of Appeal, in *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* ('*Touton*'),[115] wrongly held that the SCPA applies to service of court processes outside Nigeria (in this case, Naples, Italy).

Very recently, Aka'ahs JSC fell into the same error when he stated in his *obiter dictum* that 'The service of any process issued by the Federal High Court can be carried [out] under the Sheriffs and Civil Process Act, if such service is to be executed outside the territory of Nigeria.'[116] The *obiter dictum* of Aka'ahs JSC is not binding on lower courts in Nigeria and should not be followed.

(b) Compliance with the Leave of Court to Issue and Serve a Writ Out of Jurisdiction

The requirement for leave to issue and serve a writ on the defendant that is out of jurisdiction[117] is 'contained in the Civil Procedure Rules of all the State High

[113] *Cf Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[114] *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt. 203) 323, 333–34; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664, 681; *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR 363, 377; *Muhammed v Ajingi* (2013) LPELR-20372 (CA). However, in these cases referred to,the applicability of the SCPA to service on a defendant resident outside Nigeria was not directly in issue. It is, however, submitted in this respect that these decisions are accurate with regard to their judicial statements on the applicability of the SCPA to service on a defendant in another State *within* Nigeria.

[115] (2011) 4 NWLR (Pt. 1236) 1, 21–22.

[116] *Social Democratic Party v Biem* SC 341/2019 (unreported) 43.

[117] We have argued above that, contrary to the prevailing viewpoint, 'out of jurisdiction' can only mean *out of Nigeria*, because the law does not require a litigant to seek the leave of the High Court or Federal High Court to issue and serve a writ out of a State within Nigeria. Although the focus of this work is on international litigation, some of the cases discussed were concerned with inter-State litigation and applied the prevailing viewpoint that 'out of jurisdiction' means *out of a State in Nigeria*. In principle, we regard these cases on inter-State litigation as wrongly decided because Nigerian law does not require leave of court to issue and serve processes within the Nigerian federation. Despite this, the cases may still be useful in the international context to examine the principles on compliance with the leave of court to issue and serve a writ out of jurisdiction.

Courts and of the Federal High Court at one time or the other. Disputes over the import of the provisions are also not new'.[118] The courts in Nigeria grant leave to issue and serve a writ on a defendant that is outside the jurisdiction of the court on the following grounds:[119]

(a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits); or
(b) any act, deed, will, contract, obligation, or liability affecting land or hereditament situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
(c) any relief is sought against any person domiciled, or ordinarily resident, within the jurisdiction; or
(d) the action is one brought against the defendant to enforce, rescind, dissolve, annul or otherwise effect a contract or to recover damages or other relief for or in respect of a breach of a contract – made within the jurisdiction, or made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or by its terms or by implication to be governed by the law in force in the jurisdiction or is brought against the defendant in respect of a breach committed within the jurisdiction of a contract wherever made, even though the breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction;[120]
(e) the action is founded on tort or other civil wrong committed within the jurisdiction;[121] or
(f) any injunction is sought as to anything to be done within the jurisdiction or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
(g) any person out of jurisdiction is a necessary or proper party to an action properly brought against some other party within the jurisdiction; or
(h) the action is by a mortgagee or mortgagor in relation to a mortgage of property situate within the jurisdiction and seeks relief of the nature or kind of the

[118] *Muhammed v Ajingi* (2013) LPELR-20372 (CA).

[119] The High and Federal Court Civil Procedure Rules have similar wordings on this provision. See generally *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) 1 ALR Comm 97, (1977) NCLR 97; *Ayotebi v Barclays Bank Plc* (2016) 15 NWLR 34.

[120] One of the authorities' guiding principles is that money is paid to a creditor by a debtor where the creditor resides. See *Blaize v Dove* (1936) 13 NLR 66; *Benworth Finance Ltd v Ibrahim* (1969) 3 ALR Comm 180; *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) 1 ALR Comm 97, (1977) NCLR 97; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 577; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172, 190–91; *Eastern Bulkcem Co Ltd v MOS Amobi* (2010) 4 NWLR (Pt. 1184) 381, 402. *Cf Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516: *Ocean Fisheries (Nig) Ltd v Veepe Industries Ltd* (2009) 5 NWLR (Pt. 1135) 430, 440–42.

[121] See generally *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 1070) 109.

following that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; but does not seek (unless and except so far as permissible under paragraph (d) of this rule) any personal judgment order for payment of any moneys due under the mortgage; or

(i) the action is one brought under the Civil Aviation Act or any regulations made in pursuance of the Act or any law relating to carriage by air.

If it is established that the plaintiff's claim falls within one of the grounds for the issue and service of a writ out of jurisdiction, Nigerian courts do not automatically grant the prayers of the plaintiff as a matter of course. It must sufficiently appear to the court that the case is one in which the court should grant leave for the issue and service of the writ out of jurisdiction.[122] The court is also concerned with whether it is the *forum conveniens* to exercise jurisdiction for the action.[123]

In the interest of justice, Nigerian courts exercise their jurisdiction to grant leave to serve a writ abroad with great care for at least three reasons. First, they are wary of putting a defendant who is outside the jurisdiction of the court through the trouble and expense of answering a claim that can be more conveniently tried elsewhere.[124] Secondly, the court has to satisfy itself before granting leave that the proceedings are not frivolous, vexatious, or oppressive to the defendant who is ordinarily resident outside the jurisdiction of the court.[125] Thirdly, Nigerian courts, on grounds of comity, are wary of exercising jurisdiction over a foreign defendant who is ordinarily subject to the judicial powers of a sovereign foreign state. These factors also explain why the act of granting leave must be a judicial act – only a Judge in chambers or the court can grant leave; it cannot be done by another court official such as a Deputy Chief Registrar, even if such leave is subsequently ratified or endorsed by the court.[126]

Failure to seek leave of the court to issue the writ of summons and serve it on a defendant that is out of the jurisdiction of the court renders the writ liable to

[122] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516, 529. However, it must be stated that the requirements (and conditions to satisfy) for leave to serve a writ out of jurisdiction are indeed extensive. For example, Order 10 rules 1 to 8 of the High Court of Lagos State (Civil Procedure) Rules, 2019 make elaborate provisions for the service of court processes on foreign nationals (outside Nigeria), and one such way is through diplomatic channels as enshrined in Order 8 rule 3 of the Rules. See also *Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 489. Thus, it is a procedural matter, dependent on the manner in which each of the State High Court or the Federal High Court Civil Procedure Rules, is framed. This is outside the scope of this work.

[123] *Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516.

[124] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1; *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 20–21; *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR 434, 454.

[125] *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11.

[126] *Herb v Devimco* (2001) 52 WRN 19.

be set aside once the defendant takes prompt steps to challenge the jurisdiction of the court.[127] However, the law in Nigeria is controversial (even at the Supreme Court level) as to whether non-compliance renders the issue of the writ void, or voidable at the instance of the defendant.[128] This distinction is important. Where non-compliance is regarded as an irregularity or voidable, the defendant is obliged to take prompt steps to challenge the court's jurisdiction or the defendant will be regarded as having submitted to the jurisdiction of the court by having waived his or her right to protest the court's jurisdiction.[129] The line of authorities that adopt this position does so from at least three principal perspectives. First, a writ of summons can only be void if there is an intrinsic and substantial defect in it,

[127] Again, this is the general rule. A few State High Court Civil Procedure Rules may even dispense with the need to obtain leave to issue a writ of summons. See *Okafor v Igbo* (1991) 8 NWLR (Pt. 210) 476 (interpreting Order 5 rule 18 of the Anambra State High Court Civil Procedure Rules 1988).

[128] This controversy is aggravated by the fact that on some occasions, the appellate courts in Nigeria resort to English Supreme Court rules on the basis that the (Nigerian) rule of court does not specify the consequence that follows non-compliance with the requirement for leave to issue and/or serve a writ out of jurisdiction. The implication of this is that the Nigerian court's interpretation is dependent on the position taken in England at the material time, which leads to uncertainty. Reference was either placed on the line of English decision(s) in *Re Pritchard* [1963] 1 Ch 502 that construed a writ issued in non-compliance with English rules (pre 1964) as void, or the line of English decisions in *Harkness v Bell's Asbestos and Engineering Ltd* (1967) 2 QB 729, 735–36 that construed a writ issued in non-compliance with English rules (post 1964) as voidable. See *Aermacchi v AIC Ltd* (1986) 2 NWLR 443 (resorting to Order 2 rule 1 of the Supreme Court Rules of England 1964 while interpreting failure to comply with Order 2 rule 4 of the Lagos High Court (Civil Procedure) 1972 Rules as an irregularity that can be cured); *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt. 203) 323, 333 (resorting to Order 2 rule 4 of the Supreme Court Rules of England 1960 while interpreting failure to apply for leave to issue a writ as void); *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664 (resorting to Order 2 rule 4 of the Supreme Court Rules of England 1960 while interpreting non-compliance with Order 2 rule 16 of the Bendel State High Court (Civil Procedure) Rules on application for leave to issue a writ as void); *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 46–50 (resorting to Order 2 rule 1 of the Supreme Court Rules of England 1964 while interpreting non-compliance with Order 2 rule 4 of the Lagos High Court (Civil Procedure) Rules 1972 on application for leave to issue a writ as voidable); *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 21–22 (resorting to Order 2 rule 1 of the Supreme Court Rules of England 1964 while interpreting non-compliance with the rules on application for leave to issue a writ as voidable). Nikki Tobi JCA's approach (in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation*) in criticising the utilisation of English rules to complement the inadequacy of Nigerian rules on the subject as amounting to 'paying loyalty to our colonial past' was unanimously struck down by the Supreme Court. See also Kutgi JSC's dissenting judgment in *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 59–56 where he was of the view that resort should only be had to English rules in the absence of local rules on the matter. However, in some situations, the High Court Civil Procedure Rules may clearly provide that non-compliance is an irregularity that can be cured. See for example Order 5 rule 1 of the High Court of Lagos (Civil Procedure) Rules 1994. See also *Enterprise Bank Ltd v Deaconess Florence Rose Aroso* (2014) 3 NWLR 256 (construing Order 2 rules 1(1) and 2(1) of the High Court of Ekiti State (Civil Procedure) Rules).

[129] *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195, 202, 208; *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 270–73, 280–81; *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1; *Mako v Umoh* (2010) 8 NWLR (Pt. 1159) 82, 110; *Muhammed v Ajingi* (2013) LPELR-20372 (CA), 27–29; *Enterprise Bank Ltd v Deaconess Florence Rose Aroso* (2014) 3 NWLR 256, 294–95. In *Ezomo* and *Adegoke Motors*, the Supreme Court even cautioned that, as a matter of procedure, a challenge to the court's jurisdiction for failure to comply with the High Court Civil Procedure Rules on leave to issue and/or serve should be done at the court of first instance and not the appellate courts. Again, some High Court Civil Procedure Rules expressly provide that where there is an irregularity in the

and thus, 'service of a writ of summons outside the jurisdiction without leave of the Judge or court, does not render the writ itself a nullity. All that is affected is the service which is irregular and can be set aside.'[130] Second, statutory enactments for the benefit of an individual (not the public) are directory and not mandatory, and are thus capable of being waived.[131] Third, for policy reasons, Nigerian courts aim at substantial justice (not technicalities) and do not think the rules of the court should be applied slavishly.[132]

On the other hand, where the court interprets non-compliance as rendering the writ void, the defendant is not obliged to promptly challenge the court's jurisdiction. In other words, since non-compliance with the rules of court is construed as rendering the writ void, the submission of the parties, or waiver of the right to object, to the jurisdiction of the court by failing to promptly challenge the jurisdiction of the court does not confer the court with jurisdiction.[133] There are three principal reasons for why the relevant authorities have adopted this position. First, the rules of court are mandatory and a condition precedent to the institution of an action, and thus should be complied with.[134] Second, since the rules of court are mandatory, they are not to be 'more honoured in the breach'.

issuance/service of a writ of summons by the Registry, such an irregularity will not nullify the proceedings and the judgment of the court, and an application to set aside for irregularity any proceedings or any document or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. See Order 5 rules 1(1) and 5(1) of the High Court of Ekiti State (Civil Procedure) Rules 2011 and *Enterprise Bank Ltd v Deaconess Florence Rose Aroso* (2014) 3 NWLR 256.

[130] *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195, 208; *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 265, 273. See also *Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 490–91.

[131] *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 49–52. See generally *Ariori v Elemo* (1983) 1 SC 13.

[132] *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1.

[133] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Nepa v Onah* (1997) 1 NWLR (Pt. 484) 680 (construing Order 2 rule 16 of the High Court (Civil Procedure) Rules of Bendel State 1976); *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 417, 417–20, 428–31, 436–37 (Construing Order 5 rules 6 and 14 of the High Court of Oyo State (Civil Procedure) Rules 1988); *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182, 205–6 (construing Order 10 rule 14 of the Federal High Court (Civil Procedure) Rules 1976); *Agip (Nig) Ltd v Agip Petroli International* (2010) 5 NWLR (Pt. 2) 348, 389 (construing Order 6 rule 12(1) of the Federal High Court (Civil Procedure) Rules, 2000). See also *Mitti v New Nig Bank Plc* (1997) 3 NWLR (Pt. 496) 737, 743; *Nigerian National Petroleum Corporation v Elumah* (1997) 3 NWLR (Pt. 492) 195, 204; *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21; *Intra Motors Nigeria Plc v Akinloye* (2001) 6 NWLR (Pt. 708) 61, 72; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1; *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 288–90; *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

[134] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Nepa v Onah* (1997) 1 NWLR (Pt. 484) 680; *Owners of the MV 'ARABELLA' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 417–20, 430–31, 436–37. See also the dissenting judgment of Kutgi JSC in *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 58–60; *Intra Motors Nigeria Plc v Akinloye* (2001) 6 NWLR (Pt. 708) 61, 72; *The Owners of the MV 'MSC AGATA' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 288–90.

Also, non-compliance with the rules of the court should be sanctioned by the court.[135] Third, leave to issue a writ out of jurisdiction is not granted as a matter of course; the discretion to grant leave is exercised judicially and judiciously, and the issue of the *forum conveniens* of the court may be considered in exercising discretion to grant or refuse leave. Thus, the requirement for leave is not only for the benefit of the defendant but all the parties involved, including the court.[136]

Despite this divergence among Nigerian courts, it appears the most authoritative position of the law in this respect is the *Odua* case. In this case, the Supreme Court was called upon to pronounce on whether failure to obtain leave of the court to issue and serve the writ of summons rendered the proceedings void or voidable. By a majority of 6 to 1, the Supreme Court held that the failure to obtain leave of court before issuing and serving the writ of summons renders the proceedings an irregularity which can be waived by a defendant who fails to take prompt steps to object to the jurisdiction of the court. This case is the most authoritative because it was the first time the Supreme Court was faced with a scenario where the plaintiff failed to obtain leave of the court to issue and serve a writ out of jurisdiction and the defendant was held to have submitted to the jurisdiction of the court by failing to *promptly* challenge the court's jurisdiction. In other words, in other Supreme Court cases prior to and post *Odua*, the Supreme Court was faced with situations where the defendants promptly objected to the jurisdiction of the courts or refused to submit to the courts' jurisdiction, and the Supreme Court went as far as pronouncing the writs issued in such non-compliance as void, irrespective of whether the defendants waived their right to contest the non-compliance or whether the parties submitted to the jurisdiction of the court. Thus, the Supreme Court's decision in *Odua* is, at the moment, the only *ratio decidendi* for lower courts on the subject. Other Supreme Court decisions, where the failure of the defendant to promptly challenge the jurisdiction of the court was not in issue, are not binding, as they are at best persuasive judicial *obiter dicta* on the subject.

Another unclear area is whether the leave of court must be sought *before* the issue of the writ of summons or *after* the issue of the writ of summons, but before service of the writ. The first line of authorities (including the Supreme Court) takes the position that leave must be sought *before* the issue of the writ of summons.[137]

[135] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 429; *Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182, 205–6. See also *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 288–90.

[136] *Nwabueze v Okoye* (2002) 10 WRN 123, 156 (Agbaje JSC); *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 417–20, 428; See also the dissenting judgment of Kutgi JSC in *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 59.

[137] *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664, 688; *Nepa v Onah* (1997) 1 NWLR (Pt. 484) 680. See also *Nigerian National Petroleum Corporation v Elumah* (1997) 3 NWLR (Pt. 492) 195, 204; *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 36; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1, 22–23; *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 25–26; *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

Thus, the Court of Appeal held that a plaintiff desiring to initiate an action against a foreign defendant must apply for leave *ex parte* with an unsigned writ attached to the affidavit in support of the application *before* he or she can issue the writ and obtain leave to serve it against the foreign defendant – anything short of this renders the writ void.[138] The rationale for this position is that a writ for service out of jurisdiction cannot be validly issued without first obtaining leave of the court, and once this first step is not complied with, other steps taken in the proceedings are incompetent to vest the court with jurisdiction.[139]

Another line of authorities (including the Supreme Court) take the position that leave of the court can be validly sought *after* the issue of the writ of summons, but before service.[140] The rationale for this position is that the courts aim at substantial justice, and since the aim of obtaining the leave is to seek the permission of the court to exercise jurisdiction in respect of a defendant that is outside the court's jurisdiction, leave can be validly sought after issue of the writ of summons, but before service. A second rationale for this position is that

> where leave is sought before issue of a process the application is made to the court *ex parte* and the defendant may have the order for service set aside. Upon such application the court may be invited to reconsider its decision.[141]

The Supreme Court decision in *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* ('*Broad Bank*')[142] appears to be the most authoritative, as it is the only case where this issue directly arose for consideration. The Supreme Court took the position that leave of the court can be validly sought after issue of the writ of summons, but before service. Other cases where the Supreme Court adopted a different position in this respect are *obiter dicta* and, accordingly, not binding.

(c) Compliance with SCPA on Service of Writ of Summons Out of a State within Nigeria

The SCPA regulates matters of service of court processes within the State and Federal Capital Territory of Nigeria. Sections 96 to 103 of the SCPA contain the apposite provisions which state the following:

> 96. (1) A writ of summons issued out of or requiring the defendant to appear at any court of a State or the Capital Territory may be served on the defendant in any other State or the Capital Territory.

[138] *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1, 22–23; *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

[139] *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664, 688; *Nepa v Onah* (1997) 1 NWLR (Pt. 484) 680; *Nigerian National Petroleum Corporation v Elumah* (1997) 3 NWLR (Pt. 492) 195, 204; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1; *Deros Maritime Ltd v MV 'MSC Apapa'* (2014) LPELR-22720 (CA).

[140] See also *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 21–22.

[141] ibid.

[142] (2005) 3 NWLR 434.

(2) Such service may, subject to any rules of court which may be made under this Act, be effected in the same manner as if the writ was served on the defendant in the State or the Capital Territory in which the writ was issued.

97. Every writ of summons for service under this Part out of the State or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the Capital Territory, have endorsed thereon a notice to the following effect (that is to say)–

> 'This summons (or as the case may be) is to be served out of the .... State or as the case may be) .... and in the .... State (or as the case may be).'

98. A writ of summons for service out of the State or the Capital Territory in which it was issued may be issued as a concurrent writ with one for service within such State or the Capital Territory and shall in that case be marked as concurrent.

99. The period specified in a writ of summons for service under this Part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period.

100. Any defendant who has been served under this Part with a writ of summons may apply to the court within which the writ was issued for an order compelling the plaintiff to give security for costs, and upon such application the court may make the order.

101. When no appearance is made by a defendant to a writ of summons served on him under this Part, if it is made to appear to the court from which the writ was issued–

(a) that the subject matter of the suit, so far as it concerns such defendant, is–
  (i) land or other property situate or being in the State or the Capital Territory in which the writ was issued; or
  (ii) shares or stock of a corporation or company having its principal place of business within that State or the Capital Territory; or
  (iii) any deed, will, document or thing affecting any such land, share, stock or property; or

(b) that any contract is respect of which relief is sought in the suit against such defendant by way of enforcing, rescinding, dissolving, annulling or otherwise affecting such contract, or by way of recovering damages or other remedy against such defendant for a breach thereof, was made or entered into within that State or the Capital Territory; or

(c) that the relief sought against the defendant is in respect of a breach, within that State or the Capital Territory, of a contract wherever made; or

(d) that any act or thing sought to be restrained or removed or for which damages are sought to be recovered, was done or is to be done or is situate within that State or the Capital Territory; or

(e) that at the time when the liability sought to be enforced against the defendant arose he was within that State or the Capital Territory; or

(f) in a matrimonial cause that the domicile of the person against whom that relief is sought is within that State or the Capital Territory, and if it is also made to appear to such court

(g) that the writ was personally served on the defendant, or in the case of a corporation served on its principal officer or manager or secretary within the State or the Capital Territory in which service is effected; or

(h) that reasonable efforts were made to effect personal service thereof on the defendant, and that it came to his knowledge or in the case of a corporation that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant),

such court may on the application of the plaintiff order from time to time that the plaintiff shall be at liberty to proceed in the suit in such manner and subject to such conditions as the court may deem fit and thereupon the plaintiff may proceed in the suit against such defendant accordingly.

(2) Any such order may be rescinded or set aside or amended on the application of the defendant.

102. This Part of this Act does not confer on any court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear or determine if the writ of summons had been served within the State or the Capital Territory in which the writ was issued.

103. (1) When any process issued by a court of a State or part of the Federation other than a warrant of arrest or commitment, is required to be served on any person, such process may be served on such person in any other State or the Capital Territory.

(2) Such service may, subject to any rules of court which may be made under this Part, be effected in the same way, and shall have the same force and effect, as if the service were effected in the State or the Capital Territory in which the process was issued.

The provisions of Sections 96(2), 103(2), and 102 were discussed earlier and utilised for the purpose of taking the position that leave of the court should not be required to issue and serve a writ of summons out of the jurisdiction of the court in the context of inter-State litigation. Sections 97, 98, and 99 will be discussed with respect to what the position of the law is on failure to comply with the procedural requirements on service. The purpose and relevance of Section 101 will be discussed as it fits into the scheme of assumed jurisdiction.

Sections 97, 98, and 99 of the SCPA contain the key procedures a plaintiff should comply with in serving a writ of summons in one State that was issued in another State within Nigeria. Failure to comply with these statutory provisions could invalidate the service if the defendant takes timely steps to challenge the court's jurisdiction.[143] Again, it is controversial whether failure of the defendant in this regard renders the service voidable (or an irregularity) or void. Prior to *Odua*, there was a line of Supreme Court authorities that took the position that failure to comply with Sections 97, 98 and 99 of the SCPA renders the proceedings void, irrespective of whether the plaintiff waives its right to contest the breach or submits to the court's jurisdiction.[144] The rationale for this position was that the provisions

[143] Whether the service, or the plaintiff's court processes as a whole, are set aside is unsettled. See *Nwabueze v Okoye* (2002) 10 WRN 123, 157–58 (Agbaje JSC).

[144] *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6 (construing Section 99 of the SCPA); *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664 (construing s 97 of the SCPA); *Nepa v Onah* (1997)

of the SCPA are mandatory, and failure to comply with its provisions renders the proceedings a nullity.[145]

On the other hand, there was another line of Supreme Court authorities that took the position that failure to comply with the SCPA on service renders the proceedings voidable at the instance of the defendant, who is obliged to promptly object to the court's jurisdiction or may otherwise be regarded as having waived his right by submitting to the jurisdiction of the court.[146] There are at least two rationales in support of this position. First, the provisions of Sections 97 to 99 of the SCPA are directory and not mandatory, since they are for the benefit of an individual and not the public.[147] Second, the courts aim at substantial justice, as technicalities are a blot in the administration of justice.[148]

In a unanimous decision,[149] the Supreme Court in *Odua* favoured the second line of Supreme Court authorities' reasoning. The Supreme Court in *Odua* maintained the position it had earlier taken, that there was no conflict in its decisions.[150] It sought to reconcile its apparently conflicting decisions on the basis that in the cases where it set aside the proceedings for failure to comply with the requirements of service in the SCPA, the defendants took timely steps to set aside the proceedings and refused to waive their right or submit to the court's jurisdiction, whereas in cases where it refused to set aside the proceedings, the defendants had submitted to the jurisdiction of the court by taking substantial steps in the proceedings and waiving their right to subsequently object to the court's jurisdiction.

1 NWLR (Pt. 484) 680 (construing s 97 of the SCPA). See also the Court of Appeal cases of *NNPC v Aziegbehin* (FCA/109/83 of 23/3/84, Unreported); *Aermacchi v AIC Ltd* (1986) 2 NWLR (Pt. 23) 443; *United Bank of Africa Trustees Ltd v Nigergrob Ceramic Ltd* (1987) 3 NWLR (Pt. 62) 600 (construing ss 97 and 99 SCPA); *Okafor v Igbo* (1991) 8 NWLR (Pt. 210) 476; *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt. 203) 323; *Bello v National Bank of Nigeria Ltd* (1992) 6 NWLR (Pt. 264) 206, 217–18; *7up Bottling Company Ltd v Trio Commodities Co Ltd* (1996) 6 NWLR (Pt. 455) 441.

[145] See generally *Ifueze v Mbadugba* (1984) 1 SCNLR 427.

[146] *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195, 202–3; *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 270. See also *Niger Progress Ltd v NEL Corp* (1989) 3 NWLR (Pt. 107) 68, 80–81, 89, 96, 100–1. In addition, the Supreme Court, in *Niger Progress Ltd*, also held that a failure to comply with these provisions of the SCPA must be raised at the court of first instance; they cannot be raised on appeal (like a substantive challenge to the court's jurisdiction) – failure of the defendant to raise this challenge means that if the defendant has an appeal, he must be deemed to have abandoned the issues of challenge to the court's jurisdiction on s 97–99 SCPA.

[147] *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1, 47–52. See also *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434, 457–58.

[148] See also *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434, 453, 458.

[149] Kutgi JSC's dissent was confined to the opinion that leave of court was mandatorily required to issue the writ for service out of jurisdiction and was not capable of being waived by a defendant who submits to the court's jurisdiction by taking steps in the action. He agreed (at p 58) that non-compliance with ss 97 and 99 of the SCPA was voidable or an irregularity capable of being waived.

[150] The Supreme Court in *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 107) 250 had also taken the position, contrary to the majority decision in the Court of Appeal, that there was no conflict between the decisions in *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6 and *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195.

Some appellate courts have been content to put the controversy to rest by following the Supreme Court's decision in *Odua*.[151] Unfortunately, after the decision in *Odua*, some other appellate courts still hold that failure to comply with Sections 97, 98, and 99 of the SCPA renders the proceedings a nullity and, in that respect, rely on previous Supreme Court authorities which Ogundare JSC, in *Odua*, regarded as judicial *obiter dicta* and an unnecessary extension of the principle.[152] It is usually in cases where the defendant takes prompt steps to challenge the proceedings by refusing to submit to the jurisdiction of the court that some other appellate courts have gone as far as holding that the failure to comply with the provisions of the SCPA on service renders the proceedings void. The issue of the defendant submitting to the jurisdiction of the court or waiving the right to object to the jurisdiction of the court by taking substantial steps in the proceedings was not directly before the court, thereby rendering this line of authorities judicial *dicta* and persuasive at best.[153] It is submitted that the *Odua* line of authorities represents the authoritative position of the law on this issue.

Section 101(1) of the SCPA provides for factors that enable the defendant to apply to the court to amend or rescind its decision where the defendant fails to appear in response to the writ of summons and a decision is made against the defendant. This has been appreciated by Nigerian courts as authority to consider when deciding whether the court has jurisdiction to try the action (where a defendant does not appear), by reference to the appropriate test set out in subsection (1) of Section 101.[154] The list of factors in Section 101(1) of the SCPA are actually

[151] *Habib (Nig) Bank v Senson Ochete* (2001) 3 NWLR (Pt. 699) 114; *Ajibola v Sogeke* (2003) 9 NWLR (Pt. 826) 9 NWLR 494; *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434; *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 36; *Mako v Umoh* (2010) 8 NWLR (Pt. 1159) 82, 110; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 490, 494; *CBN v Interstella Communications Ltd* (2018) All FWLR 442, 487–88. The Supreme Court, in *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434, 457–58, further held, in respect of Section 99 of the SCPA being directory, that once a defendant is given 30 days to enter appearance to a writ of summons served outside the jurisdiction of a court, the failure to endorse on the writ that the defendant has 30 days within which to enter appearance to the writ would not invalidate the writ. *Cf Owners of the MV 'Arabella' v Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt. 1097) 182, 204–9; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 18 NWLR (Pt. 1119) 388, 429 (Ogbuagu JSC).

[152] *Intra Motors Nigeria Plc v Akinloye* (2001) 6 NWLR (Pt. 708) 61, 72; *Kida v Ogunmola* (2006) 13 NWLR (Pt. 997) 377, 398; *Drexel Energy and Natural Resources Ltd v Trans International Bank Ltd* (2008) 11 NWLR (Pt. 1097) 182, 417–20, 428–29; *Touton SA v Grimaldi Compagnia Di Naviga Zioni SPA* (2011) 4 NWLR (Pt. 1236) 1, 21–22; *The Owners of the MV 'MSC Agata' v Nestle (Nig) Plc* (2014) 1 NWLR 270, 289–92.

[153] *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664; *Nepa v Onah* (1997) 1 NWLR (Pt. 484) 680. See also the Court of Appeal cases of *Nigerian National Petroleum Corporation v Aziegbehin* (FCA/109/83 of 23/3/84, Unreported); *Aermacchi v AIC Ltd* (1986) 2 NWLR (Pt. 23) 443; *United Bank of Africa Trustees Ltd v Nigergrob Ceramic Ltd* (1987) 3 NWLR (Pt. 62) 600; *Okafor v Igbo* (1991) 8 NWLR (Pt. 210) 476; *Derby Pools Ltd v Ocheme* (1991) 7 NWLR (Pt. 203) 323; *Bello v National Bank of Nigeria Ltd* (1992) 6 NWLR (Pt. 264) 206, 217–18; *7up Bottling Company Ltd v Trio Commodities Co Ltd* (1996) 6 NWLR (Pt. 455) 441.

[154] *Barzasi v Visinoni Ltd* (1973) NCLR 373, 379; *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250, 294–95; *Nigerian National Petroleum Corporation v Anwuta* (2000) 13 NWLR (Pt. 684) 363.

possible grounds upon which a defendant in inter-State litigation, that is resident outside the court's jurisdiction and has not submitted to the court's jurisdiction, can challenge the jurisdiction of the court if the plaintiff's case does not meet one or more of the criteria (of the factors listed therein). Section 101 is similarly worded to and has the same intent as the old Australian Service and Execution of Process Act 1901. In *Tallerman & Co Pty Ltd v Nation's Merchandise (Vic) Pty Ltd*,[155] the High Court of Australia interpreted the provision as follows:

> The defendant enters a conditional appearance, objecting to the jurisdiction and then applies by summons to have the writ set aside. If the defendant establishes that the case does not fall within any of the classes specified in S.11 of the Service and Execution of Process Act, an order is made setting aside the writ (strictly speaking, it would seem that the service of the writ, and not the writ itself should be set aside). If it appears the case falls within one of the classes mentioned in Section 11 of the Act, the appearance becomes unconditional.[156]

Thus, with respect to the decision in *Muhammed v Ajingi*,[157] which was discussed earlier, we submit that the Court of Appeal should have considered whether the case fell within any of the grounds listed in Section 101(1) of the SCPA, and on that basis, established its jurisdiction or declined to do so, instead of wrongly holding that the defendant (which was resident outside the court's jurisdiction and failed to appear before the court) had submitted to the court's jurisdiction.

(d) Consequences of Non-compliance with Relevant Rules

It has been stated earlier that the failure to comply with the rules of court and SCPA means that the writ is voidable at the instance of the defendant who is obliged to take prompt steps to challenge the jurisdiction of the court. The filing of court processes is usually done by counsel, but some administrative tasks, such as service and endorsement of processes, are reserved for court officials. The question that arises in this respect is whether the failure of the court officials to comply with the rules of the court or SCPA should be visited on litigants in situations where counsel have done their part as required by law?

Historically, the Supreme Court regarded the source of the irregularity – administrative or caused by counsel – as immaterial; that is, the consequences were the same in the eyes of the court. Thus, in *Sken Consult (Nig) Ltd v Ukey*,[158] Nnamani JSC held that:

> The learned counsel for the respondents in the course of his argument before us conceded that there had been no compliance with Section 99 of the Sheriffs and Civil Process Act but has asked us to regard it as an irregularity due to administrative

[155] (1957) 98 CLR 93.
[156] *Tallerman & Co Pty Ltd v Nation's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 108.
[157] (2013) LPELR-20372 (CA).
[158] (1981) 1 SC 6.

> problems of the High Court Registry. I am of the contrary view and I think that all the breaches in the instant case of the regulations relating to service and appearance are fundamental defects and go to the question of the competence and the jurisdiction of the court which pronounced the orders sought to be set aside.[159]

The Supreme Court of Nigeria in recent times, however, appears to be adopting a liberal attitude that protects counsel and litigants where errors emanate from court officials. This is reflected in *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd*,[160] in which the Supreme Court was construing Order 3 rule 5 of the High Court of Lagos State (Civil Procedure) Rules 1994, which provides that the endorsement of a writ of summons for service out of a state within Nigeria is to be done by the Registrar of the court. Pats-Acholonu JSC, in his leading judgment (with whom other Justices of the Supreme Court unanimously agreed), held that:

> The argument of learned counsel for the appellant is that it is the duty of the registrar of the court to perform the functions of endorsement and therefore the appellant should not be punished for the failure or negligence of the registrar. If the prescription of the law is that a writ should be of a certain nature or in certain manner before it can be valid for service, it is the bounden duty of the registrar to perform his duty of endorsing the process. The appellant cannot be punished for the negligence or tardiness of the registrar in the performance of his duty.[161]

In *Enterprise Bank Ltd v Deaconess Florence Bosearoso* ('*Bosearoso*'),[162] the Supreme Court towed the same line of thinking in *Broad Bank*, when jointly construing Order 5 rules 1 and 6 of the High Court (Civil Procedure) Rules of Ekiti State. Rhodes-Vivour JSC, in his leading judgment (with which other Supreme Court Justices unanimously agreed), held that:

> The combined effect of the above is that the writ of summons shall be issued by the Registrar and such a process can only be served on the adverse party residing out of jurisdiction after leave is obtained.
>
> Once the plaintiff (respondent) presented both processes to the Registrar as was done on 22/8/97 and the appropriate fees paid (as was done), in the eyes of the law the plaintiff has done all that is required of him for proceeding to commence. His responsibility has come to an end. It is now the responsibility of the Registrar to ensure compliance with the law. The plaintiff cannot be held liable for incompetent handling of his application/process by staff in Registry.[163]

The current approach of the Supreme Court in *Bosearoso* and *Broad Bank* is welcome, as it aims at substantial justice and protects the interest of litigants.

[159] (1981) 1 SC 6, 25. See also *Nwabueze v Okoye* (1988) 4 NWLR (Pt. 91) 664.
[160] (2005) 3 NWLR (Pt. 912) 434.
[161] (2005) 3 NWLR (Pt. 912) 434, 457. See also *Panalpina World Transport Holding AG v Ceddi Corporation Ltd* (2012) 2 NWLR 463, 495.
[162] (2014) 3 NWLR 256.
[163] ibid, 294.

III. Choice of Venue, Location of Cause of Action and Territorial Jurisdiction

The preceding sections discussed how courts apply the rules on jurisdiction in actions *in personam*, especially in the context of inter-State litigation. They revealed how the courts have struggled and sometimes erred in their application of the rules – often designed for international litigation – in the federal context. This section further explores two issues in which Nigerian courts have failed to appreciate how the rules on jurisdiction in actions *in personam* should be applied in light of the Federal Constitution that Nigeria operates. The issues are: do choice of venue rules meant for allocating which judicial division should try a matter within a State (State High Court)[164] or Nigeria (Federal High Court) apply to inter-State conflicts? Secondly, is a court's jurisdiction ousted where the cause of action arose in another State? In order to expose and critique the approach of appellate courts that have erred, this section discusses this problem in some depth.

A. Choice of Venue and Judicial Division

It was stated earlier that for Nigeria, having a Federal Constitution with separate High Courts for each State and a High Court for the Federal Capital Territory, the question of jurisdiction as between the various State High Courts in the absence of direct legislation on the point is governed by common law rules of conflict of laws (or private international law). In the case of the Federal High Court of Nigeria, which is just one court with different divisions in Nigeria, the resort to choice of venue rules to determine which Federal High Court should hear a matter is appropriate. In addition, where a dispute arises as to whether a State and Federal High Court has jurisdiction or another court of a foreign country, the principles of private international law are engaged.

Without prejudice to the above, State and Federal High Courts in Nigeria are usually divided into different judicial divisions to hear a matter. These judicial divisions are also described as a 'venue for instituting actions' in the relevant Federal and State High Court Civil Procedure Rules. Judicial divisions are created for administrative and geographical convenience by the rules of court to regulate the institution and trial of various kinds of actions within the jurisdiction of a State and Federal High Court.[165] For example, Lagos State has four judicial

[164] It could also be referred to as an 'intra-State' matter.

[165] *British Bata Shoe Co v Melikian* (1956) 1 FSC 100, 323; *Ogunsola v All Nigeria People's Party* (2003) 9 NWLR (Pt. 826) 462; *International Nigerbuild Construction Co Ltd v Giwa* (2003) 13 NWLR (Pt. 836) 69; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 1059) 99; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133–34; *Ogunde v Gateway Transit Limited* (2010) 8 NWLR (Pt. 1196) 207; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *SDP v Biem* SC 341/2019 (unreported).

divisions: Lagos, Ikeja, Epe and Ikorodu. In the event there is a dispute as to which of the judicial divisions should hear a matter, the rules of court are to be relied on.[166]

The rules of court, in allocating which judicial division within the State or Federal Capital Territory of Nigeria should entertain a cause of action, usually utilise factors such as the place where the cause of action arose, the place of performance or where it ought to be performed, the place where the contract was entered into, and the place of residence or business of the defendant. Choice of venue rules are not to be utilised to address the jurisdictional competence of the court to entertain a case as between State High Courts, or between State and Federal High Courts and foreign courts.[167] It is also submitted that the rules of private international law should not apply to determine what court in a judicial division within a State (in the case of a State High Court) or the Federation (in the case of the Federal High Court) should be competent to exercise jurisdiction in an action *in personam*.[168]

The earliest and most authoritative precedent for this position is the Supreme Court's decision in *British Bata Shoe Co v Melikian*.[169] The action in this case was filed in the former Supreme Court of Nigeria, Lagos Division, but before it came up for trial, the Supreme Court was replaced by five independent High Courts, each exercising jurisdiction within its territorial limits. The High Court of Lagos exercised jurisdiction in the Federal Capital Territory of Lagos,[170] while the then High Court of Eastern Nigeria exercised jurisdiction in respect of the Eastern part of Nigeria.[171] Counsel on both sides sought to rely on the then Order 7 of the Supreme Court Rules, relating to venue for instituting legal actions between various judicial divisions of the former Supreme Court of Nigeria, which had then been converted to the Lagos State High Court.[172] Counsel for the defendant relied on Order 7 rule 1, which, in substance, provided that land matters were to be determined by the judicial division where the land was situated. Counsel for the plaintiff, on the other hand, relied on Order 7 rule 3, which provided that suits relating to breach of contract could be instituted in the judicial division in which the contract ought to be performed or the judicial division in which the defendant resided. The Supreme Court rightly held that what applied was in fact Section 9 of the High Court of Lagos Ordinance 1955, which vested the High Court of Lagos with the same jurisdiction as the High Court of Justice in England. The Supreme

[166] Order 4 of the High Court of Lagos (Civil Procedure) Rules 2019 (formerly Order 2 of the High Court of Lagos (Civil Procedure) Rules 2012).

[167] See also *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195.

[168] *Cf Société General Bank (Nig) Ltd v Aina* (1999) 9 NWLR (Pt. 619) 414, 425 where the Court of Appeal adopted the wrong approach.

[169] (1956) 1 FSC 100.

[170] The Federal Capital Territory of Nigeria is now Abuja.

[171] The States of the former Eastern Nigeria are now Anambra, Abia, Imo, Enugu and Ebonyi.

[172] The Supreme Court Rules relied on were no longer relevant to the parties' case, as the former Supreme Court was now the Lagos High Court (or lower court) in this case. *British Bata Shoe Co v Melikian* (1956) SCNLR 321, 325–26, 328.

Court used that as the basis to apply conflict of laws, by exercising jurisdiction *in personam* over a defendant resident in Lagos (within the court's jurisdiction) with respect to land situate in Aba, the then Eastern Region of Nigeria, in relation to a claim for specific performance.

In *Nwabueze v Okoye*,[173] Obaseki JSC, following earlier Supreme Court authorities,[174] rightly observed that '[I]n matters of jurisdiction, the common law rules [on private international law] apply as between States within the Federation of Nigeria.'[175] In *Ogunsola v All Nigeria Peoples Party*,[176] Oduyemi JCA, speaking at the Court of Appeal, rightly held that:

> Where the dispute as to venue is not one between one division or another of the same State High Court or between one division or the other of the F.C.T. Abuja High Court, but as between one division or the other of the F.C.T Abuja High Court, but as between the High Court of one State in the Federation and the High Court of the F.C.T. then the issue of the appropriate or more convenient forum is one to be determined under the rules of Private International Law formulated by courts within the Federation.[177]

Again, Oduyemi JCA rightly amplified and elucidated the position of the law as it related to the case:

> When having regard to the cause of action or the place of residence or business of the parties, the matter falls entirely to be determined by the High Court of the Federal Capital Territory or of a State, one looks to the civil procedure rules applicable to determine the venue in the State whose High Court or in the F.C.T. Abuja would exercise jurisdiction.
>
> However, as in this case where the place of residence of the plaintiff is the same as that in which the cause of action arose i.e. Kwara State but not the place of business of the defendants – Abuja F.C.T. – one has to look into the domestic private international law applicable in Nigeria.[178]

In *Zabusky v Israeli Aircraft Industries*,[179] the issue before the court was whether the Lagos State High Court had jurisdiction to entertain a tort of libel that occurred outside its jurisdiction, and where the defendant was also resident outside its jurisdiction. The Lagos State High Court ruled that it had no jurisdiction based on Order 2 rule 4 of the Lagos State High Court (Civil Procedure) Rules, a choice of venue rule. Salami JCA drew support from Obaseki JSC's *dictum* in the Supreme Court case of *Ezomo v Oyakhire*[180] and applied the rules of private

[173] (1988) 4 NWLR (Pt. 91) 664.
[174] *British Bata Shoe* Co *v Melikian* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1974) NMLR 82.
[175] The same Supreme Court Justice rightly took the same approach in *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195.
[176] (2003) 9 NWLR (Pt. 826) 462.
[177] *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462, 480.
[178] ibid, 480.
[179] (2008) 2 NWLR (Pt. 109) 109.
[180] (1985) 1 NWLR (Pt. 2) 195.

international law.[181] In overturning the decision of the lower court in his leading judgment (with which other Justices unanimously agreed), Salami JCA (as he then was) rightly held that:

> It is manifestly clear from a section of the provisions of Order 2 rule 4 that it does not cover the situation that arose in this case, that is, a defendant resident outside Lagos State or Nigeria. The provision in my view refers to suits which can be commenced in the judicial division which are invariably created mainly for convenience. They do not vest nor divest High Court of Lagos State with jurisdiction.

In *Muhammed v Ajingi*,[182] the Court of Appeal (Abiru JCA) correctly stated and applied the law in this respect when it held:

> It was not in contest between the parties that the Respondent, as plaintiff, resided and carried on business in Kano State while the Appellant, as defendant, resided and carried on business in Kaduna State, outside the territorial boundaries of Kano State. The Respondent commenced this action against the Appellant in Kano State High Court. The question is – whether the Kano State High Court can exercise jurisdiction over a defendant not resident or carrying on business within the territorial boundaries of Kano State? It is an inter-state matter and it touches upon the territorial jurisdiction of Kano State High Court. It has nothing to do with judicial divisions of the High Court of Kano State which is an intra-state matter and it is not governed by the High Court of Kano State (Civil Procedure) Rules. Thus, the references made to judicial divisions and to the High Court Rules in the submissions of Counsel to the parties were completely off the mark.[183]

Unfortunately, some Nigerian appellate courts have failed to appreciate the above principle.[184] The failure to do so is divided into three scenarios. First, Nigerian courts may reach the right decision in light of an action *in personam*, but wrongly apply choice of venue rules to reach this right decision. Second, Nigerian courts may wrongly apply choice of venue rules and reach the wrong decision. Third, Nigerian courts may also muddle the application of choice of venue rules with private international law rules to an action *in personam*.

With respect to the first scenario, in *Nwankwo v Ecumenical Dev Co Society*,[185] the Court of Appeal, in a suit for breach of contract and recovery of debt, wrongly applied the approach of utilising the choice of venue rule of Order 4 rule 3 of

[181] *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133–36.

[182] (2013) LPELR-20372 (CA).

[183] See also *Niger Aluminium Manufacturing Co. Ltd v Union Bank* (2015) LPELR-26010 (CA) 32–36 (Abiru JCA dissenting); *Lemit Engineering Ltd v RCC Ltd* (2017) LPELR-42550 (CA) 20–24 (Tsammani JCA).

[184] See also *National Bank of Nigeria Ltd v John Akinkunmi Shoyoye* (1977) 5 SC 181, 191–92; *Ndaeyo v Ogunaya* (1977) 1 SC 11; *International Nigerbuild Construction Co Ltd v Giwa* (2003) 13 NWLR (Pt. 836) 69; *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 36–37; *Kraus Thompson Org Ltd v Unical* (2004) 9 NWLR (Pt. 879) 631; *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR (Pt. 1020) 148, 164–65; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 640) 99; *Conoil v Vitol SA* (2012) 2 NWLR 50.

[185] (2002) 1 NWLR (Pt. 794) 513.

the High Court of Anambra State (Civil Procedure) Rules, 1988 in determining whether the Enugu State High Court or Ebonyi State High court had jurisdiction over the claim. Order 4 rule 3 provides that 'all suits for specific performance or upon the breach of any contract may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides'. Although the Court of Appeal was correct in its decision to hold that the Enugu State High Court had jurisdiction on the basis of the residence of the defendant in Enugu, it should simply have done so from the private international law perspective that the defendant's residence within the court's jurisdiction gave the plaintiff the right to invoke the jurisdiction of the court.

In *First Bank of Nigeria Plc v Kayode Abraham*,[186] a suit was instituted by the plaintiff-appellant in the Lagos High Court against the defendant-respondent for breach of contract arising from a loan agreement. The defendant was resident within the court's jurisdiction. The Supreme Court reached the correct decision that the Lagos State High Court had jurisdiction (based on the residence of the defendant and Lagos also being the place of performance), but reached this decision erroneously by relying on Order 2 rule 3 of the High Court of Lagos State (Uniform Civil Procedure) Rules, instead of relying on the private international law principle that the residence of the defendant within the court's jurisdiction gives the plaintiff the right to invoke the court's jurisdiction in an action *in personam.*

In *Eastern Bulkcem Co Ltd v MOS Amobi*,[187] the Court of Appeal rightly held that the Lagos State High Court and Rivers State High Court had jurisdiction to entertain a case for recovery of fees of a legal practitioner where the defendant was resident within Port Harcourt, Rivers State and the contract was to be performed in Lagos State. However, the Court of Appeal reached this decision by wrongly relying on the choice of venue rule of Order 2 rule 3 of the High Court of Lagos State (Uniform Civil Procedure) Rules, 1983.

Furthermore, in *Theobros Auto-link (Nig) Ltd v Bakely International Auto Engineering Co*,[188] the plaintiff-respondent instituted an action at the High Court of Akwa Ibom State for recovery of a liquidated money demand. The defendant entered an unconditional appearance in the suit, and judgment was entered against the defendant. The defendant-appellant appealed, contending that the High Court had no jurisdiction as the contract was to be performed in Aba, Abia State, where the defendant was resident. The Court of Appeal dismissed the appeal. Although the Court of Appeal rightly held that the Akwa Ibom State High Court had jurisdiction in this case, it wrongly utilised the choice of venue rule of Order 10 rule 3, Akwa Ibom State High Court (Civil Procedure) Rules, 1989, in coming to the conclusion that the Akwa Ibom State High Court had jurisdiction because the contract was entered into in Akwa Ibom State. The Court of Appeal in this case,

[186] (2008) 18 NWLR (Pt. 1118) 172.
[187] (2010) 4 NWLR (Pt. 1184) 381.
[188] (2013) 2 NWLR (Pt. 1338) 337.

based on the rules of private international law, should simply have held that the defendant had submitted to the court's jurisdiction by entering unconditional appearance to contest the case on its merits at the lower court.

With respect to the second scenario, where Nigerian courts may wrongly apply choice of venue rules and reach the wrong decision, in *Arjay Ltd v Airline Management Support Ltd*,[189] the plaintiff-respondent sued the defendant-appellants for breach of contract (arising from an aircraft lease agreement) in the Federal High Court. The defendant-appellant was outside the jurisdiction of the court (being resident and carrying on business in the United Kingdom) and the plaintiff rightly obtained leave to issue and serve the defendants out of the jurisdiction of the court. On being served, the defendant-appellant challenged the jurisdiction of the court by relying on Order 10 rule 1(4) of the Federal High Court (Civil Procedure) Rules, 1999 which provides that

> [a]ll suits for specific performance, or upon the breach of any contract, shall be commenced and determined in the Judicial Division of the court in which the contract is supposed to have been performed or in which the defendant resides or carries on substantial part of his business.

Based on this rule, the defendant-appellant contended that since the defendant-appellant was resident outside the court's jurisdiction, the place of performance was Equatorial Guinea – the stipulated location where the aircraft was to be delivered to the plaintiff under the contract – and since the contract was also concluded in the United Kingdom, the Federal High Court had no jurisdiction to entertain the case. The plaintiff, based on the same rule, contended that the Federal High Court had jurisdiction on the basis that the place of performance was also in Kano, Nigeria, where the aircraft had made a stop. The Supreme Court upheld the submission of the defendant-appellants in this case by relying on Order 10 rule 1(4). The Supreme Court held that the Federal High Court lacked jurisdiction because all the defendant-appellants were outside the court's jurisdiction, the contract was made in the United Kingdom, and the place of performance was in Malabo, Equatorial Guinea.

It is respectfully submitted that both counsel for the parties and the Supreme Court missed the main point in this case. The principles of private international law should have been engaged, and recourse to choice of venue rules was inappropriate. To be precise, the basis upon which the foreign defendant may have appropriately challenged the court's jurisdiction should have been the fact that none of the conditions existed (or were satisfied) upon which the Federal High Court had jurisdiction to grant leave to serve the writ of summons on the defendant-appellants. In the alternative, if the foreign defendant-appellants conceded that the Federal High Court had properly assumed jurisdiction in ordering leave to issue and serve the writ of summons, the doctrine of *forum non conveniens* could

[189] (2003) 7 NWLR (Pt. 820) 577.

have been utilised as a basis upon which it would be determined whether the Federal High Court should exercise or decline jurisdiction, since the defendant was contending the suit had more connections with the United Kingdom (and even Equatorial Guinea) than Nigeria.[190] The doctrine of *forum non conveniens* would have been the correct approach to reaching the decision on whether the court should rightly decline jurisdiction.

In *Afribank Nigeria Plc v Bonik Industries Ltd*,[191] the plaintiff sued the defendant for breach of contract and made a claim for summary judgment in the Ibadan Judicial Division of the Oyo State High Court under the undefended list procedure. The defendant-appellant did not enter an appearance in this case. Judgment was entered for the plaintiff. The defendant-appellant appealed to the Court of Appeal, where it relied on Order 10 rule 3 of the High Court of Oyo State (Civil Procedure) Rules 1988, which provides that '[a]ll suits for specific performance, or upon breach of contract, shall be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides or carries on business'. On this basis, the defendant-appellant contended that its residence, the place of performance, and the place where the cause of action arose were in Ilesa, Osun State. The plaintiff-respondent, on the other hand, argued that the court had equitable jurisdiction over the parties, and the defendant-appellant was also resident and carried on business in Ibadan as one of its corporate offices was situated there. The Court of Appeal upheld the defendant-appellant's position. Both the Court of Appeal and counsel in this case missed the point as Order 10 rule 3 of the High Court of Oyo State rule was not relevant. The principles of private international law should have been invoked. To be precise, since the defendant-appellant was resident outside the High Court of Oyo State's jurisdiction,[192] and refused to submit to the court's jurisdiction, the Court of Appeal should have considered whether any Section 101(1) of the SCPA was relevant to give the High Court of Oyo State jurisdiction over the defendant-appellant that refused to enter an appearance in the case based on the connecting factors in the claim.

In *Ocean Fisheries (Nig) Ltd v Veepe Industries Ltd*,[193] the defendant-appellant raised the issue of jurisdiction for the first time at the Court of Appeal in a case commenced at the Ogun State High Court for recovery of debts that the defendant-appellant owed the plaintiff-respondent for supplies made at the defendant-appellant's factory at Lagos State. The defendant-appellant's registered office was situated in Lagos State while the respondent carried on its business in Ogun State. The defendant-appellant defended the case on its merits and lost. The Court of Appeal wrongly relied on the choice of venue rule of Order 10 rule 3 of the High Court of Ogun State (Civil Procedure) Rules, 1988, which provides that '[a]ll

[190] See generally *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR (Pt. 912) 434.
[191] (2006) 5 NWLR (Pt. 973) 300, 310.
[192] Its head office was located in Ilesa, Osun State.
[193] (2009) 5 NWLR (Pt. 1135) 430.

suits for specific performance, or upon breach of contract, shall be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides' in holding that the Ogun State High Court did not have jurisdiction to entertain a case of breach of contract where the defendants were resident and carrying on business in Lagos State.[194] The Court of Appeal should have simply resorted to the principles of private international law, and also held that the defendant-appellant, having defended the case on its merits, had submitted to the jurisdiction of the High Court of Ogun State since it failed to challenge the court's jurisdiction.

In *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd*,[195] the Supreme Court, with due respect, wrongly held that the High Court of Zamfara State did not have jurisdiction for a claim of breach of contract because the defendants were all resident in Kano State, where the contract was also to be performed. This decision was reached based on the Supreme Court's reliance on Order 10 rule 3 of the High Court of Sokoto State (Civil Procedure) Rules 1987, relating to the right judicial division to institute an action. The Supreme Court should have applied the principles of private international law and held that the defendants' failure to challenge the court's jurisdiction at the High Court of Zamfara State (having raised the issue of jurisdiction for the first time at the Court of Appeal), by filing a defence and taking steps in the proceedings, amounted to submission.

With respect to the third scenario, where Nigerian courts may muddle the application of choice of venue rules with private international law rules to an action *in personam*, in *George v SBN Plc*,[196] the plaintiff instituted an action for wrongful dismissal at the High Court of the Federal Capital Territory in respect of a cause of action that arose in Jos. The defendants were also resident in Jos. The Court of Appeal wrongly applied a choice of venue rule[197] in holding that the High Court of the Federal Capital Territory was not the proper venue for instituting the action and that the High Court of Plateau State instead had jurisdiction. The Court of Appeal also wrongly held:

> The various rules of court contain provisions for choices of venue or the right judicial division in each case where a plaintiff can institute an action. Where there is no provision in the Rules as to venue in respect of any matter within the jurisdiction of a High Court the choice of venue is governed by the rules of common law on the position in Private International Law.[198]

The basis upon which the Court of Appeal reached its decision is incorrect. The principles of Nigerian private international law are not dependent on the absence of provisions for choice of venue in the Civil Procedure Rules of the State and

[194] It perpetuated the same error by following *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 577; *First Bank of Nigeria v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172.
[195] (2013) 16 NWLR (Pt. 1379) 60.
[196] (2009) 5 NWLR (Pt. 1134) 302.
[197] Order 10 rule 4(1) of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 1991.
[198] *George v SBN* (2009) 5 NWLR (Pt. 1134) 302, 318.

Federal High Courts. At the risk of being prolix, the principle of private international law in inter-State litigation applies as between various State High Courts of the Federation, while the rules as to choice of venue apply within judicial divisions of the High Court *within a State*, or as between State judicial divisions of the Federal High Court *within Nigeria*. In addition, although it is admitted that the plaintiff in this case could not invoke the jurisdiction of the High Court of the Federal Capital Territory as of right because the defendant was not resident and did not submit to the court's jurisdiction, the provisions of Section 101(1) of the SCPA should have been utilised as a basis for determining if the High Court of the Federal Capital Territory should exercise or decline jurisdiction. The resort to choice of venue rules was inappropriate in this case.

In *Nahman v Allan Wolowicz*,[199] the plaintiff sued the defendant in contract to recover a debt. The defendant was served out of jurisdiction in England. It was common ground among the parties and the court that this was an action *in personam*, and the rules of private international law applied. However, the Court of Appeal, in a unanimous decision, wrongly endorsed the approach of the High Court by applying the choice of venue rule of Order 1A rule 3 of the High Court of Lagos (Civil Procedure) Rules 1972, which provides that 'all suits for specific performance or upon *the breach of any contract* may be commenced and determined in the judicial division in which such contract *ought to have been* performed or *in which the defendant resides*' (emphasis added).[200] By relying on Order 1A rule 3, the Court of Appeal held that since the contract ought to have been performed in Nigeria or England where the defendant-appellant resided, the Nigerian court and English court had concurrent jurisdiction in the matter. The decision of the Court of Appeal in this case was correct to the extent that it resorted to the principles of private international law and held that the Nigerian High Court could assume jurisdiction, but the Court of Appeal wrongly made reference to a choice of venue rule that had no application to this case.[201]

From what has been discussed so far, choice of venue rules should only apply within the judicial divisions of the High Court within a State or the Federal High Court of Nigeria. State High Court Civil Procedure Rules usually provide for choice of venue within a State for geographical and administrative convenience. In the case of a Federal High Court, because there is just one Federal High Court in Nigeria with different judicial divisions, choice of venue rules would apply as between the Federal High Courts located in several States of Nigeria. The principles of private international law apply in inter-State litigation between the State High Courts of Nigeria. In international litigation, they apply in cases engaging the State and Federal High Courts and foreign courts. Where private international law is engaged, the court should particularly look out for whether there is presence

[199] (1993) 3 NWLR (Pt. 282) 443.

[200] Emphasis added by Kalgo JCA (as he then was) in *Nahman v Allan Wolowicz* at 455. See also *Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516.

[201] See also *Ayotebi v Barclays Bank Plc* (2016) 15 NWLR 34.

or residence of the defendant within the court's jurisdiction and submission of the defendant to the court's jurisdiction, or service out of jurisdiction by the plaintiff. Where the court establishes that it has jurisdiction in any of these cases, it could further consider, based on its inherent jurisdiction, whether it should *exercise* jurisdiction based on considerations of *forum non conveniens.* Another basis upon which the defendant (outside the court's jurisdiction) can challenge the court's jurisdiction in inter-State matters is by relying on the factors listed in Section 101 of SCPA, by arguing that none of the conditions have been met to vest the court with jurisdiction.[202] Thus, it may be said that as choice of venue rules in the State and Federal High Court Civil Procedure Rules apply to the allocation of judicial divisions within a State (State High Court) or the Nigerian Federation (Federal High Court), Section 101 of the SCPA also applies, by analogy, to inter-State litigation when the defendant outside the jurisdiction seeks to contest the *exercise* of a court's jurisdiction based on the location of the connecting factors at issue.

The use of choice of venue rules to address matters that require the application of private international law is incorrect. It also does not lead to the sound administration of justice in throwing out cases based on the wrong principle of law.

B. Territorial Jurisdiction and where a Cause of Action Arose

Previously, it was submitted that Nigerian courts have powers to assume jurisdiction in an action *in personam* where the defendant is present or resident in the jurisdiction, or submits to it. This is so irrespective of where the cause of action arose.[203] The implication of this is that any of the High Courts in a State or the High Court of the Federal Capital Territory can establish jurisdiction in an action *in personam* in *inter-State* matters, subject to the doctrine of *forum non conveniens.*[204] However, there are at least two exceptions to this rule. First, in respect of land matters, the court of the *lex situs* (the court of the place of location of the land) possesses exclusive jurisdiction in land matters; a court has no jurisdiction to entertain matters concerning title to or right to possession of immovable property outside its jurisdiction.[205] Second, a court cannot establish jurisdiction

[202] See also HA Olaniyan, 'Inter-state Service of Process in the Nigeria Federation and the Sheriffs and Civil Process Act' (2012) 38 *Commonwealth Law Bulletin* 69.

[203] *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23–25.

[204] These powers are primarily derived from ss 6(6)(b), 257 and 272 of the 1999 Constitution. See *Barsoum v Clemency International* (1999) 12 NWLR (Pt. 632) 516; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR (Pt. 826) 462.

[205] *Lanlehin v Rufai* (1959) 1 FSC 184; *Societe General Bank (Nig) Ltd v Festus Olabode Aina* (1999) 9 NWLR (Pt. 619) 414. This exception must be qualified to the extent that where the institution of the land matter is aimed at requiring the defendant(s) resident within the court's jurisdiction to perform a personal obligation, whether arising out of contract (such as specific performance) or implied contract, fiduciary relationship or fraud, foreclosure or redemption of equity, or other unconscionable conduct that will be frowned upon in the eyes of equity, it becomes an action *in personam* where another court can establish its equitable jurisdiction over a defendant resident within its jurisdiction. See *British Bata Shoe Co v Melikian* (1956) SCNLR 321.

in an action *in personam* where it is mandatorily prohibited by the Constitution or a statutory enactment.[206] In other words, the court's jurisdiction does not exist in such a case, and the question of establishing jurisdiction in an action *in personam* is otiose. More clearly stated, although State High Courts and Federal High Courts are empowered to establish their jurisdiction in actions *in personam*, their powers are statutorily and constitutionally curtailed so that a State High Court cannot establish its jurisdiction in an action *in personam* in an Admiralty matter that is exclusively reserved for the Federal High Court.[207]

In *Benson v Ashiru*,[208] the Supreme Court recognised the powers of the Lagos High Court to assume jurisdiction in respect of an accident that took place outside its territorial jurisdiction in Ijebu Ode, the then[209] Western Region,[210] where the defendant was resident within the court's jurisdiction. Also, in *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd*,[211] the Supreme Court followed its earlier decision in *British Bata Shoe v Melikian*[212] in holding that the Lagos State High Court had jurisdiction in an action *in personam* to entertain a cause of action arising from Warri (outside the territorial jurisdiction of the Lagos State High Court), as the defendants in the case were resident and carrying on business in Lagos State. In particular, the Supreme Court, in overturning the Lagos High Court, which took the position that it had no jurisdiction to entertain a cause of action located outside its territorial jurisdiction, made this remarkable holding:

> Turning to the other items of claim, it is impossible to resist the conclusion that they are as well claims or actions *in personam*. One of them deals with a declaration that the respondents are holding certain assets admittedly situate outside the territorial jurisdiction of the High Court of Lagos State as trustees for the appellants, the respondents being within the territorial area of jurisdiction, and other claims ask for the taking of an account and payment over of sums or amounts of money that are found due to the appellants. These are conventional equity claims … We have no doubt hesitation whatsoever in coming to the conclusion that the actions in both cases are actions *in personam* as between the parties and their conduct and are matters in respect of which the High Court of Lagos State, applying and adopting the rules of jurisdiction of conflict of laws adopted and employed by Her Majesty's Court of Justice in England, has the necessary jurisdiction and should have exercised such jurisdiction.[213]

[206] Nigerian conflict of laws does not dispute this rule. See the Supreme Court case of *Swiss Air Transport Company Ltd v African Continental Bank Ltd* (1971) 1 NCLR 213. See also *Barzasi v Visinoni Ltd* (1973) NCLR 373.

[207] Section 251(1)(g) of the 1999 Constitution. The same applies in respect of diplomatic personnel resident within the court's jurisdiction who refuses to submit to a court's jurisdiction.

[208] (1967) NMLR 363.

[209] Now in Ogun State.

[210] This is despite the Supreme Court controversially applying a common law rule meant for choice of law in tort (also known as 'double actionability') as a basis for justifying the exercise of jurisdiction of the Lagos State High Court. See also the Court of Appeal decisions in *Ajakaiye v Adedeji* (1990) 7 NWLR (Pt. 161) 192; *Herb v Devimco* (2001) 52 WRN 19; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 1070) 109.

[211] (1973) NCLR 146.

[212] (1956) SCNLR 321.

[213] *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) NCLR 146, 172.

In *Barzasi v Visinoni*,[214] Wheeler J, in rejecting the territorial jurisdiction argument as a basis for establishing jurisdiction in an action *in personam*, brilliantly held that in Nigeria:

> No statutory provision and no rule of court provides that where in an action relating to a contract *the defendants appear before the court*, the court shall only have jurisdiction *if the contract was entered into or was to be performed or breach of the contract took place within the territorial jurisdiction of the* … High Court (emphasis added).[215]

In fact, it is submitted that, flowing from Wheeler J's judgment, there is no part of the 1999 Constitution that prohibits any of the courts in Nigeria from establishing jurisdiction in actions *in personam* where the cause of action arose outside their territorial jurisdiction – provided the defendant is present or resident within the jurisdiction and is willing to submit. A contrary interpretation would be a death sentence to the doctrine of jurisdiction in actions *in personam*, which ignores the principles of private international law that are part of the Nigerian legal system through common law!

In *Zabusky v Israeli Aircraft Industries*,[216] the Court of Appeal followed the Supreme Court's decision in *Benson v Ashiru* and held (Salami JCA) that:

> I am next to consider the submission to the effect that the publication made to an ambassador in his residence is one made in a foreign country and out of jurisdiction of the High Court of Lagos State. The High Court of Lagos has jurisdiction reading together Sections 10 and 11(1)(a) of its High Court Law concurrent jurisdiction with her Majesty's High Court of Justice. It implies that the court, like her Majesty's High Court is entitled to enforce principles of private international law.[217]

In *Muhammed v Ajingi*,[218] the Court of Appeal (Abiru JCA) rightly observed that the concept of territorial jurisdiction is one of the most misunderstood concepts in Nigerian conflict of laws. After the Court of Appeal set out the conditions upon which the courts in Nigeria can establish jurisdiction in actions *in personam*, it rightly held that under the rules of conflict of laws, the location of the place where the cause of action arose plays no part in determining jurisdiction of a court to hear the matter.

Unfortunately, contrary to the above position, some appellate courts in Nigeria have adopted a legal position that does not take into account the fact that irrespective of where the cause of action arose, at common law, they can establish jurisdiction in respect of that cause provided the defendant is present or resident in the jurisdiction or is willing to submit to it.[219] This approach is wrong.

[214] (1973) NCLR 373.
[215] ibid, 381–82.
[216] (2008) 2 NWLR (Pt. 1070) 109.
[217] ibid, 141.
[218] LPELR-20372 (CA) 23–25, 25–26.
[219] See also *Nwabueze v Okoye* (2002) 10 WRN 123, 150 (Agbaje JSC); *Dajo Bello v Usman* (1999) 4 NWLR (Pt. 599) 380, 389; *IK Martins (Nig) Ltd v UPL* (1992) 1 NWLR (Pt. 217) 322; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60, 94.

In *Afribank (Nig) Plc v Bonik Industries*,[220] the Court of Appeal was wrong to have held that, based on the principle of territorial jurisdiction, the Oyo State High Court did not have jurisdiction simply because the cause of action was located in Ilesa, Osun State.[221]

In *Capital Bancorp Ltd v Shelter Savings and Loans Ltd*,[222] the plaintiff-appellant sued the defendant-respondent for detinue and conversion in the Lagos High Court. The cause of action arose in Onitsha, Anambra State.[223] The defendant-respondent, on being served, promptly challenged the jurisdiction of the High Court on the basis that, as the cause of action arose in Onitsha, Anambra State, it was Anambra State that had territorial jurisdiction. The plaintiff-appellant, on the other hand, argued that the High Court of Lagos State could assume jurisdiction in an action *in personam* based on the residence of the defendant-respondent. In addition, the plaintiff-appellant also relied on a choice of venue rule in arguing that the defendant-respondents were resident within the jurisdiction of the High Court of Lagos State, and that the principal contract which gave rise to the detinue and conversion occurred in Lagos State. The Supreme Court endorsed the position of the Court of Appeal in upholding the contention of the defendant-respondents. The Supreme Court wrongly reached the decision that, since the cause of action in respect of detinue and conversion arose in Onitsha, Anambra State, the Lagos High Court's jurisdiction in the matter was ousted.

There are two other perspectives wrongly taken by the Supreme Court in this case that are worthy of attention. First, Mukhtar JSC (as she then was), in her leading judgment, rightly held that Order 1A rule 3 of the High Court of Lagos (Civil Procedure) Rules, 1972 did not apply to the case. However, this decision was reached based on an erroneous principle of law. Reliance was not placed on the principles of private international law (particularly jurisdiction in actions *in personam*), but rather, Mukhtar JSC wrongly reached her decision on the basis that since Section 239 of the 1979 Constitution[224] empowered High Courts to each have individual civil procedure rules to regulate the exercise of their jurisdiction, 'the Lagos State High Court Rules cannot be applied to litigation that should take its root from Anambra State'.[225] It was emphasised that although the High Court had unlimited jurisdiction in civil matters,[226]

> each State of Nigeria has its High Court Rules of practice and procedure, which must be adhered, and the Constitution having given each state that power to make its rules, such rules which may differ from state to state will govern the State's High Court exercise of its jurisdiction.

[220] (2006) 5 NWLR (Pt. 973) 300.
[221] ibid, 313–14.
[222] (2007) 3 NWLR (Pt. 1020) 148.
[223] This was the concurrent finding of the Court of Appeal (1999) 7 NWLR (Pt. 609) 71 and Supreme Court. This aspect of the judgment is not disputed.
[224] Now s 274 of the 1999 Constitution.
[225] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR (Pt. 1020) 148, 164.
[226] As provided by the then s 239 of the 1979 Constitution.

With due respect, this holding had no relevant bearing on the powers of the court to apply principles of private international law, such as establishing jurisdiction in actions *in personam* (as in this case) where the dispute revolved around whether the Lagos State High Court or Anambra State High Court had jurisdiction in this case.[227] Secondly, counsel for the plaintiff-appellant rightly called on the Supreme Court to appreciate and recognise the power of the Lagos State High Court to assume jurisdiction in an action *in personam* in respect of the defendant-respondents who were resident within the jurisdiction of the Lagos State High Court.[228] Particularly significant was the case made out to the Supreme Court by the plaintiff-appellant, that the Court of Appeal had failed to appreciate the decision of the Supreme Court in *Melikian*. Mukhtar JSC (as she then was), in her leading judgment (unanimously agreed with by other Justices of the Supreme Court), endorsed the position of the Court of Appeal without qualification.[229] The significant portion of the Court of Appeal's decision referred is worth quoting:

> The Federal Supreme Court had a recourse to the prevailing practice in England in order to reach the conclusion that an action for specific performance of a contract relating to land outside the jurisdiction of the Lagos State High Court could be heard in Lagos because the court has equitable jurisdiction to enforce contract over persons residing within its jurisdiction … The correct view therefore is that the jurisdiction of the Lagos High Court to adjudicate in the Bata Shoe case was treated as an exception to the general rule because the Lagos High Court was called upon to exercise an equitable jurisdiction in decreeing the specific performance on contract. Further, it was necessary to invoke the practice in England because there were no local rules on the point …[230]

First, it must be stated from the outset that the Court of Appeal and the Supreme Court were simply wrong to have justified the approach taken by the Supreme Court in *Melikian* on the basis that it was resorting to the English practice because there was no local rule on the point. That approach did not, in any way, feature in the judgment of *Melikian*. In addition, the Supreme Court in *Melikian* was very clear that the High Court was empowered to apply the principles of common law private international law (and in particular jurisdiction in actions *in personam*), and these powers were also enabled by the rules of court.

Second, the Court of Appeal and Supreme Court were right to hold that the Supreme Court in *Melikian* was applying an exception to the general rule that only the court of the *lex situs* has jurisdiction in land matters, in order for the Lagos State High Court to exercise equitable jurisdiction to decree an order of specific performance in respect of contract. However, the Lagos State High Court's jurisdiction,

[227] Furthermore, the principles of *forum conveniens* should have been engaged as to whether the Lagos State High Court or Anambra State High Court was the more convenient forum to exercise jurisdiction.

[228] Reference was rightly placed on *Ayinule v Abimbola* (1957) 1 LLR 41; *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100; *Ndaeyo v Ogunaya* (1977) 1 SC 11.

[229] *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR (Pt. 1020) 148.

[230] ibid, 165–66.

through the principles of private international law, was to be exercised in the action *in personam* since the defendants were resident within its jurisdiction.[231] Therefore, the Supreme Court, in *Capital Bancorp Ltd v Shelter Savings and Loans Ltd*, should have held that the Lagos State High Court had jurisdiction in this case based on the residence of the defendant-respondents within the jurisdiction.[232]

In *Dairo v Union Bank of Nigeria Plc*,[233] the Supreme Court, with due respect, wrongly held that the Lagos State High Court lacked jurisdiction to entertain a libel suit (where the defendant-respondent was resident within its jurisdiction) because the cause of action that gave rise to the libel occurred in Ogun State.[234] The reasons upon which the Supreme Court reached this incorrect decision are also open to objection. Counsel for the plaintiff-appellant had vehemently contended that the Supreme Court's decision in *Benson v Ashiru*, which applied the principles of private international law, was applicable to this case. IT Muhammed JSC (as he then was), in his leading judgment (with whom other Supreme Court Justices agreed), distinguished the Supreme Court's decision in *Benson v Ashiru* on the basis that:

> it is germane at this juncture to state that, law generally, whether statute or case law, is an organic phenomenon which develops along with the society. It is worthy of note that the *Benson's case (supra)* was decided in 1967. I think I am entitled to take judicial notice that by 1967, this country was experiencing its 1st Military Rule which was by Decrees and Edicts in addition to adopted laws of general application applicable in the courts and Nigeria was just broken into 12 States from the then Regional Governments. So there was still some hangovers and fusion of laws, rules and practices of the regions into the newly created states. This continued for some time. However, in 1979, a Constitution for the whole Federation was enacted into law which demarcated the territorial jurisdiction of each State with its Local Governments. The 1999 Constitution provided for the demarcation to each of the states including new ones. Lagos and Ogun States are by that exercise two different States, each with its separate geographical entity and Local Governments.

Based on the above reasoning, IT Muhammed JSC, with due respect, perpetuated the same error in reasoning adopted by Mukhtar JSC in *Capital Bancorp Ltd v Shelter Savings and Loans Ltd*[235] when he held that:

> Section 234 of the same Constitution established a High Court for each State of the Federation with its Chief Judge and other Judges (Section 270 of the 1999 Constitution).

[231] In other words, there was a confluence between the principles of equity and private international law for the purpose of exercising jurisdiction.

[232] This would be subject to the principles of *forum non conveniens*.

[233] (2007) 16 NWLR (Pt. 640) 99.

[234] Another incorrect aspect of the decision was the constant reference to whether the Lagos State High Court or Ogun State High Court was the 'proper venue' (diction used to refer to the proper judicial division or choice of venue that is competent to hear a case) to institute the action, in the concurring judgments of Ogbuagu JSC at 149–64 and Chukwuma-Eneh JSC at 162–66. The majority in the Supreme Court did not adopt this approach.

[235] (2007) 3 NWLR (Pt. 1020) 148.

> Each of the High Courts has its own rules of practice and procedure which operate independent of one another.
>
> Thus, if a cause of action arises in any of the States of the Federation within the period when the 1979 Constitution started to be in application, and except where jurisdiction is taken away by the same Constitution, jurisdiction must reside in the respective court of that State.[236]

Ogbuagu JSC, in his concurring judgment, wrongly distinguished *Benson v Ashiru* on the basis that the case does not cover all areas of torts, including libel,

> because the principle involving fatal accident cases cannot and will never be the same principle as to jurisdiction in libel cases as eloquently stated by this court that in an action for libel the proper venue is where the cause of action arose – i.e. where the libel was published and not where the defendant resides.[237]

With due respect, the learned Justices failed to appreciate the Supreme Court's decision in *Benson v Ashiru*, which recognised and applied the principle of private international law in a country operating a Federal Constitution. *Benson v Ashiru*, in principle, was no different from the Supreme Court decisions in *British Bata Shoe v Melikian* and *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* to the extent that the Supreme Court, in these pioneer cases, recognised the powers of the State High Courts in Nigeria to apply the principles of private international law under a Federal Constitution. The import of these decisions means that Lagos State High Court, in exercising jurisdiction *in personam*, may, by right, entertain a cause of action that arises outside its territorial jurisdiction if (at least) the defendant is resident within the court's jurisdiction or submits to the court's jurisdiction. The distinction between jurisdictional rules applicable to the tort of fatal accidents and jurisdictional rules applicable to the tort of libel was simply irrelevant and off the mark.

In addition to the Supreme Court in *Dairo v Union Bank of Nigeria Plc* not following its previous decision in *Benson v Ashiru*, the court rightly held that the provisions of Order 1A, rule 3 of the High Court of Lagos State (Civil Procedure) Rules 1972, which determines what choice of venue or judicial division in Lagos State could entertain the matter, was irrelevant to the determination of whether the Lagos State High Court or Ogun State High Court was competent to hear this case. However, the court reached this decision on an erroneous principle of law (as it did not place reliance on the principle of conflict of laws) when it held that:

> [I]t is the nature of the claim before the court and the Constitution and or other statutes that confer jurisdiction on a court. The jurisdiction in this matter is that of venue or place of trial. Going by the provision of the Constitution of the Federal Republic of Nigeria, 1979 (including the 1999 Constitution), it is the High Court of Ogun State that can properly exercise its jurisdiction on a libel matter that arise in Ogun State

[236] (2007) 16 NWLR (Pt. 640) 99, 141–42.
[237] ibid, 158, 160–61.

> irrespective of which Judicial Division handles the suit in Ogun State. It is very certain that where a cause of action arose is different from instituting an action outside the Judicial Division in the same State where the cause of action arose.[238]

IT Muhammed JSC, in order to drive home his point in the above judgment, completely relied on a quoted part of the Court of Appeal's decision (which was also wrongly decided in some respects) in *International Nigerbuild Construction Co Ltd v Giwa*:[239]

> there is a world of distinction between jurisdiction as it relates to the territorial, geographical jurisdiction of a court and jurisdiction in relation to the judicial division within which to commence an action. The distinction between venue, as an aspect of jurisdiction which could be administrative or geographical, in which a suit may be heard, is often provided in the rules of courts of various States of the Federation. But *when it comes to territorial jurisdiction, which is whether a suit ought to have been brought in one state but brought in another, the criteria is different. In such a case, the court has no jurisdiction and it cannot be conferred by agreement or consent of the parties* (emphasis added).[240]

The Court of Appeal again incorrectly reasoned their way to the correct conclusion, that the choice of venue rules did not apply in this case[241] (endorsed by the Supreme Court)[242] by stating that the Chief Judge of the Lagos State High Court had no powers to transfer the case to the Ogun State High Court by the provisions of the 1999 Constitution,[243] as such powers only applied to judicial divisions within a State.[244] With due respect, these reasons advanced by the Court of Appeal and Supreme Court for refusing to apply choice of venue rules had no relevant bearing on the case in question. Again, at the expense of labouring the point, the correct answer to disregarding the application of a choice of venue rule as between the Lagos High Court and the Ogun State High Court was to simply apply the principles of private international law.

Most appellate courts in Nigeria have unfortunately perpetuated this error. The Court of Appeal, in *Ogunde v Gateway Transit Ltd*,[245] wrongly held that the High

[238] ibid, 143–44.

[239] (2003) 13 NWLR (Pt. 836) 69. See also *Lemit Engineering Ltd v. RCC Ltd* (2017) LPELR-42550 (CA) 20–24.

[240] (2003) 13 NWLR (Pt. 836) 69, 75. Insofar as the High Court of a State is vested with jurisdiction by the 1999 Constitution, a suit can be instituted in any of the States of the Federation, including the Federal Capital Territory, provided the defendant is resident within jurisdiction or is willing to submit. This position should not exclude the inherent powers of the court to decline jurisdiction based on *forum non conveniens*.

[241] Appeal No CA/L/554/95, Unreported.

[242] (2007) 16 NWLR (Pt. 640) 99.

[243] ibid, 155.

[244] With due respect, instead of addressing the issue of transferring the case by one Chief Judge of a High Court of a State to another High Court of a State, the doctrine of *forum conveniens* in private international law may have been engaged instead.

[245] *Ogunde v Gateway Transit Ltd* (2010) 8 NWLR (Pt. 1196) 207.

Court of Ogun State lacked jurisdiction in respect of a claim of negligence that took place in Lagos State because it was Lagos State High Court that had exclusive territorial jurisdiction in the case, despite the defendants being resident in Ogun State.[246] It is submitted that the residence of the defendants within the jurisdiction in this case gave the plaintiff the right to invoke the jurisdiction of the High Court of Ogun State. In *George v SBN Plc*,[247] the Court of Appeal was wrong to hold that the High Court of the Federal Capital Territory could not entertain an action arising from Plateau State, Jos because it was outside its territorial jurisdiction. In the case of *Ocean Fisheries (Nig) Ltd v Veepe Industries Ltd*,[248] the Court of Appeal wrongly held that the Ogun State High Court had no jurisdiction in respect of a contract that took place in Lagos State on the basis that it was the Lagos State High Court that had exclusive territorial jurisdiction in the case.[249] In both *George v SBN Plc* and *Ocean Fisheries (Nig) Ltd v Veepe Industries Ltd*, the Court of Appeal should have applied the principle of submission, as the defendants in these cases defended the suit on its merits.

There are good reasons why a court can assume jurisdiction in respect of a cause of action that arises outside its jurisdiction if the defendant is present or resident in, or submits to, its jurisdiction. For example, a resident defendant will usually have assets in the jurisdiction to satisfy the judgment. It is also amenable to the contempt jurisdiction of the court in case of disobedience. The place where a cause of action arises may also be fortuitous and will impose an unnecessary burden on both plaintiff and defendant if 'forced' to litigate there. For example, two Lagos residents are involved in an accident while driving in Ogun State. Can they litigate in Lagos or they should go to Ogun where they may not have a connection at all? Third, the position adopted by the courts ignores the distinction between jurisdiction and choice of law. In the preceding example, the fact that the Lagos court assumes jurisdiction on the basis of residence does not mean that it will apply Lagos law to the dispute. The applicable law may be Ogun State law.

This approach of these appellate courts in Nigeria is faulty, troubling, and regrettable. The logic used in inter-State matters could also be extended to mean that a cause of action that takes place outside Nigeria divests a Nigerian court of territorial jurisdiction. Such an undue restriction on the court's jurisdiction does not help international commercial litigation. It does not make the Nigerian forum attractive for litigation. Indeed, Nigerian courts should not be too willing to divest themselves of jurisdiction – particularly based on incorrect principles of law – which does not enhance the sound administration of justice.

[246] The Court of Appeal followed the erroneous approach of the Court of Appeal in *International Nigerbuild Construction Co Ltd v Giwa* (2003) 13 NWLR (Pt. 836) 69; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 640) 99.

[247] (2009) 5 NWLR (Pt. 1134) 302, 319.

[248] (2009) 5 NWLR (Pt. 1135) 430.

[249] ibid, 439–40, 444.

IV. Conclusion

This chapter discussed jurisdiction in actions *in personam* in Nigeria. The courts in Nigeria establish jurisdiction in actions *in personam* on the basis of residence of the defendant, submission, and assumed jurisdiction (in cases where the defendant is outside the jurisdiction of the court). Assumed jurisdiction is a particularly complex area in Nigerian conflict of laws due to incorrect and conflicting decisions of the appellate courts on the issue of leave to issue and serve a writ out of jurisdiction. It is hoped that appellate courts will aim for an interpretation that enhances substantial justice, and the courts should not be too ready to divest themselves of jurisdiction based on the wrong principles of law and procedural technicalities. It is also a call to Chief Judges of State High Courts to amend the rules of the court in order to aim for uniformity and substantial justice. The Civil Procedure Rules of the High Court and Federal High Court should be amended to clearly and uniformly specify that 'out of jurisdiction' means 'out of Nigeria', in order to bring it to conformity with the SCPA and to avoid the problems of interpretation encountered by Nigerian courts in inter-State litigation. The rules should also uniformly and clearly provide that in a bid to honour substantial justice, failure to comply with the rules of the court on the leave to issue and serve a writ of summons out of jurisdiction makes the writ voidable at the instance of the party affected (usually the defendant), who must take prompt steps to challenge the irregularity.

An area of Nigerian law which deserves to be revisited is the settled principle of law that litigants can raise the issue of jurisdiction at any stage in the proceedings – even at the Supreme Court – for the first time. It is submitted that this rule is unduly technical and leads to protracted delays; it is not favourable to litigants. It simply means that a successful party (on the merits of the case), who has invested time and resources in litigating a dispute for a long time, from the High Court to the Supreme Court, can have its case thrown out on the issue of jurisdiction. It also becomes deeply regrettable if the action becomes time-barred after the suit is thrown out by the Supreme Court! This puts Nigerian law in a sorry state that deserves constitutional reform to the effect that a party who wishes to challenge the existence of a court's jurisdiction must do so in a timely manner or be deemed to have waived its right to do so. This view outweighs the counterarguments, that the mandatory provisions of a statute or the Constitution should not be more honoured in the breach, as the court of first instance could also raise the issue of jurisdiction and invite the parties to make submissions in that respect, or that the party challenging the court's jurisdiction could do so in a timely manner.

This chapter exposed the wrong approach of some appellate courts in Nigeria in overlooking the concept of jurisdiction in actions *in personam* in Nigerian conflict of laws – particularly in relation to the erroneous utilisation of choice of venue rules to determine conflict of laws issues, and the insistence that in inter-State

litigation a court cannot exercise jurisdiction in respect of a cause of action that takes place in another State. It is hoped that Nigerian appellate courts will appreciate the significance of the concept of jurisdiction in actions *in personam* in order to reduce the number of cases that are wrongfully thrown out of court on incorrect principles of law. This will enhance the value of international commercial litigation in Nigeria.

6

Forum Selection Clauses, *Forum Non Conveniens* and *Lis Alibi Pendens*

I. Introduction

A Nigerian court may have jurisdiction *in personam* to resolve a dispute, but may, as a matter of judicial discretion, decline to exercise its jurisdiction.[1] A Nigerian court could decline jurisdiction on the basis of a forum selection clause[2] or *forum non conveniens*.[3] In this regard, what is being challenged is the *exercise* of the court's jurisdiction and not the *existence* of the court's jurisdiction.[4] In other words, the defendant may acknowledge the existence of the court's jurisdiction but pray for the court not to exercise its jurisdiction. Where the defendant does not want the court to exercise jurisdiction, he must promptly challenge the court's jurisdiction and must do so before taking further steps in the proceedings. Failing this, the defendant will be deemed to have submitted to the jurisdiction of the court.[5] A challenge to the *exercise* of a court's jurisdiction cannot be successfully made for the first time on appeal except where the court is prohibited from

[1] For an extensive academic analysis on this subject see also AA Olawoyin, 'Forum Selection Disputes under Bills of Lading in Nigeria: A Historical and Contemporary Perspective' (2005) 29 *Tulane Maritime Law Journal* 255; AA Olawoyin, 'Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bill of Lading' (2006) 17 *The American Review of International Arbitration* 239, 252–54; RF Oppong, 'Choice of Law and Forum Agreement Survives a Constitutional Challenge in the Kenya Court of Appeal' (2007) 33 *Commonwealth Law Bulletin* 158; AA Olawoyin, 'International Trade Disputes and Forum Selection in Bills of Lading – Contemporary Development in Nigeria' (2011) *Kuramo Journal of Law and Development*; HA Olaniyan, 'Conflict of Laws and an Enlightened Self Interest Critique of Section 20 of the Admiralty Jurisdiction Act of Nigeria' (2012) 1 *NIALS International Journal of Legislative Drafting* 22; A Kennedy, 'Approaches to Jurisdiction Clauses in Anglophone African Common Law Countries: Principle and Policy' (2019) 27 *African Journal of International and Comparative Law* 378–399.

[2] Forum selection clause in this work includes arbitration and jurisdiction clauses.

[3] In the common law tradition, *lis alibi pendens* is not a distinct head for declining jurisdiction. It is one of the factors considered in *forum non conveniens* analysis.

[4] In this regard, some Nigerian lawyers and judges fall into the error of saying that the court has *no jurisdiction* rather than saying the court *should not exercise jurisdiction*.

[5] See generally *Obembe v Wemabod Estates* (1977) 5 SC 115, 131; *Allied Trading Company Ltd v China Ocean Shipping Line* (1980) (1) ALR Comm 146; *GBN Line v Allied Trading Limited* (1985) 2 NWLR (Pt. 5) 74; *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532, 537–38; *Akpaji v Udemba* (2003) 6 NWLR (Pt. 815) 169; *LSWC v Sakamori (Nig) Ltd* (2011) 12 NWLR (Pt. 1262) 569; *Williams v Williams* (2013) 3 CLRN 114.

assuming jurisdiction under the law.[6] The decision to exercise or decline jurisdiction in favour of another forum is discretionary, but should be exercised in a principled manner. An appellate court would interfere only where the discretion has not been properly exercised. Also, since the challenge to the exercise of the court's jurisdiction arises during interlocutory proceedings, judges must be careful to avoid making pronouncements that may affect the final determination of the case on its merits.[7]

This chapter discusses forum selection clauses and *forum non conveniens*. The chapter also examines the Admiralty jurisdiction of the Federal High Court to stay or dismiss proceedings in breach of a forum selection clause or on grounds of *forum non conveniens* and *lis alibi pendens*.

II. Forum Selection Clauses

A forum selection clause is an agreement between the parties to litigate or arbitrate in a chosen forum. This agreement is usually made prior to the dispute occurring, particularly in international commercial transactions, as it enhances predictability and reduces the time and costs spent on determining which forum to litigate or arbitrate in if the parties respect the agreement. A forum selection clause could also be entered into after the dispute occurs. The ability of the parties to choose a forum in which to litigate or arbitrate is a reflection of the principle of party autonomy in private international law.

There are two points which need to be stated at this juncture in correcting the errors some Nigerian judges made in this area of private international law. The first is that some Nigerian lawyers and judges confuse or equate a forum selection clause with a choice of law clause.[8] They are conceptually different. A forum selection clause is an agreement between the parties to litigate or arbitrate in a particular forum, while a choice of law is an agreement to apply a particular law or laws to a dispute arising between the parties. The parties are free to choose a

[6] *Cf* Tobi JSC in *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 540; *Resolution Trust Corp v FOB Investment & Property Ltd* (2001) 6 NWLR (Pt. 708) 246, 261 (Chukwuma-Eneh, JCA, as he then was). Again, this error arises from the failure to distinguish between the *existence* and *exercise* of a court's jurisdiction; or the difference between jurisdiction which must be *mandatorily exercised* under the enabling statute and the Constitution, and one where the court has no discretion under the enabling statute and the Constitution.

[7] *Falowo v Banigbe* (1998) 7 NWLR (Pt. 559) 679; *Zekeri v Al Hassan* (2003) FWLR (Pt. 177) 779, 792.

[8] See *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 14–15 (Galadima JCA); *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31, 37–38 (Oguntade JCA, as he then was); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was); *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR 172 (with the exception of IT Mohammed JSC (as he then was) at 200–201); Adekeye JSC in *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 531. See also *Dairo v UBN* (2007) 16 NWLR 99, 143–44 (IT Muhammed JSC); *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148, 164–66 (Mukhtar JSC as she then was) in the context of inter-State jurisdiction.

different law and jurisdiction, so a choice of law clause is not, by itself, decisive that the parties have chosen a particular jurisdiction in which to litigate, and vice versa.[9]

Second, it is incorrect to state that parties, by their choice, cannot confer jurisdiction on Nigerian courts in the inter-State litigation context, as some Nigerian appellate Justices have done.[10] In other words, the concept of forum selection clauses applies not only to international litigation and international and domestic arbitration, but also to inter-State litigation.[11]

In respect of arbitration agreements, some Nigerian appellate courts do not make a distinction as to whether the words used in the agreement to arbitrate are permissive or mandatory before they can enforce the agreement, so that the parties' use of 'may' instead of 'shall' is immaterial, as the court would enforce the arbitration clause chosen by the parties regardless.[12] In respect of jurisdiction clauses, the authors have not come across any Nigerian decisions that distinguish between exclusive jurisdiction clauses and non-exclusive jurisdiction clauses. It is unclear if Nigerian courts would adopt the approach applied to arbitration agreements. There are important reasons why parties may choose a non-exclusive jurisdiction agreement, such as not wanting to bar the possibility of instituting proceedings in another court.

A forum selection clause is generally contained in a contract, and as a forum selection clause is a contractual term the parties have agreed to, a significant issue is whether the principles of contract law applicable to *the terms of a contract* may be fully extended and applied to a forum selection clause.[13] In general, while the terms of a contract bear striking similarities with a forum selection clause, they are not the same. A forum selection clause exists independently (*sui generis*) of the contract in which it is contained. It is also a 'unique' contractual term, which the court ultimately holds discretion to enforce, unlike most other contractual terms.

[9] Admittedly, both concepts share some similarities in that under common law, a choice of law clause is usually a strong indication to litigate or arbitrate in a chosen *forum*, just as a forum selection clause is a strong indication that the *law* of the chosen forum applies, and parties usually choose the same law and forum to apply for the sake of convenience and to save costs.

[10] *Dairo v UBN* (2007) 16 NWLR 99, 143–44 (IT Muhammad JSC, as he then was); Kutgi JSC (as he then was) dissenting in *Odu'a Investment Company Limited v Talabi* (1997) 10 NWLR 1, 59. The correct way to express this statement of law is to say that parties cannot by consent confer jurisdiction on a Nigerian court where such jurisdiction does not exist. *Cf George v SBN Plc* (2009) 5 NWLR 302, 318 (Aboki JCA).

[11] Parties who enter into a commercial transaction in Sokoto State may enter into a jurisdiction clause that designates the High Lagos State to resolve disputes because they think the High Court of Lagos is usually faster in resolving commercial disputes, and the judges in Lagos State have reputable expertise in commercial law.

[12] Aboki JCA in *Sino-Africa Agriculture & Ind Company Ltd v Ministry of Finance Incorporation* (2013) LPELR-22379 (CA) 32–33. It could be argued, on the contrary, that 'may' is non-exclusive – allowing parties to resort litigation – and 'shall' is exclusive, meaning that the parties only intend to resort to arbitration unless they wish to approach the court to obtain protective remedies.

[13] See generally V Black and SGA Pitel, 'Forum-selection Clauses: Beyond the Contracting Parties' (2016) 12 *Journal of Private International Law* 26.

Although jurisdiction clauses and arbitration clauses bear striking similarities (as forum selection clauses), they are conceptually different. Thus, jurisdiction and arbitration clauses are treated separately in this work.

A. Foreign Jurisdiction Clause

Foreign jurisdiction clauses (or choice of court clauses) have generated significant attention in Nigerian courts in the context of international commercial litigation. Not much attention has been devoted to the significance of 'foreign' jurisdiction clauses in the context of inter-State litigation. It is submitted that since Nigeria operates a Federal Constitution, there is no reason why the rules applicable in the international litigation context should not apply to the inter-State context, except in relation to areas where there are applicable statutory provisions that mandate the parties to litigate in a particular State of the Federation. Foreign jurisdiction clauses are discussed under the sub-headings below.

(i) Foreign Jurisdiction Agreements and Forum Non Conveniens

The presence of an exclusive jurisdiction clause in an agreement between the parties designating another court is a good reason why the Nigerian court would decline jurisdiction in favour of the chosen court, unless the plaintiff advances a strong cause to the contrary. It has been observed by the Nigerian Court of Appeal that breach of an exclusive foreign jurisdiction clause in respect of proceedings instituted in Nigeria is *prima facie* an abuse of the Nigerian court's process.[14]

The discretion a judge exercises in deciding whether to stay proceedings that are brought in breach of a foreign jurisdiction clause should not be confused or compared with the grant of a stay of proceedings pending an appeal from a court's decision.[15] They are two different situations. A stay in relation to an action in breach of a foreign jurisdiction clause is concerned with private international law; a stay pending appeal does not have private international law aspects and should not be approached using private international law principles, and vice versa.

In early cases, the approach of Nigerian courts was generally not to grant a stay in the presence of a foreign jurisdiction clause as Nigerian courts were, on policy grounds, reluctant to decline jurisdiction.[16] In *Adesanya v Palm Lines Ltd*,[17] the plaintiff, who was a businessman and resident in Nigeria, was a consignee of potatoes that were shipped by the defendant (which was also carrying on business in Nigeria) from London. The agreement between the parties gave exclusive

[14] *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 91 (Bada JCA).
[15] *Cf* Tobi JSC in *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 540–42.
[16] See also *Ventujol v Compagnie Francaise De L'Afrique Occidentale* (1949) 19 NLR 32.
[17] (1967) NCLR 133.

jurisdiction to the English courts and some parts of the contract were expressly to be governed by English law. A dispute arose between the parties when the plaintiff alleged that the goods were damaged upon arrival at the Lagos port of discharge. The plaintiff brought an action for damages against the defendant in the Lagos High Court. The defendant prayed the court to stay the action based on the exclusive jurisdiction clause in favour of the English courts. Adefarasin J held that since the cause of action arose in Nigeria where the damage to the goods was discovered, the plaintiff was resident in Nigeria, English law was similar to Nigerian law, and the parties would enjoy similar facilities in the Nigerian court to those available if they sued in English courts, it was in the interest of justice for the proceedings to be conducted in Nigeria.

About three years after the decision of Adefarasin J in *Adesanya v Palm Lines Ltd*, Brandon J, in *The Eleftheria*,[18] delivered a brilliant decision on this subject. The decision provided comprehensive guidelines that the English court should take into account in deciding whether to give effect to a foreign jurisdiction clause. This is often referred to as 'the Brandon test'. Nigerian courts have regularly referred to the Brandon test and utilised it with approval in decided cases.[19] The test is stated hereunder as follows (as it has been referred to and applied) in the Nigerian context:

1. Where plaintiffs sue in Nigeria in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the Nigerian court, assuming the claim to be otherwise within the jurisdiction is not bound to grant a stay but has a discretion whether to do so or not.
2. The discretion should be exercised by granting a stay unless strong cause for not doing it is shown.
3. The burden of proving such strong cause is on the plaintiffs.
4. In exercising its discretion the court should take account of all the circumstances of the particular case.
5. In particular, but without prejudice to (4), the following matters where they arise, may be properly regarded:
   (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Nigerian and foreign courts.
   (b) Whether the law of the foreign court applies and, if so, whether it differs from Nigerian law in any material respects.
   (c) With what country either party is connected and how closely.

[18] *The Owners of Cargo Lately Laden on Board the Ship or Vessel 'Elftheria' v 'The Elftheria' (Owners), 'The Elftheria'* [1969] 1 Lloyd's Rep 237.

[19] See generally *GBN Line v Allied Trading Limited* (1985) 2 NWLR (Pt. 5) 74; *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520; *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509; *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA).

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign country because they would
  (i) be deprived of security for that claim;
  (ii) be unable to enforce any judgment obtained;
  (iii) be faced with a time-bar not applicable in Nigeria; or
  (iv) for political, racial, religious, or other reasons be unlikely to get a fair trial
  (v) the grant of a stay would amount to permanently denying the plaintiff any redress.

Nigerian courts have applied the Brandon test in different factual circumstances. In *Sonnar (Nig) Ltd v Partenreedri MS Norwind* ('*Sonnar*'),[20] the plaintiffs entered into an agreement with the defendants to ship bags of rice from Thailand to Nigeria. Clause 3 of the Bill of Lading provided that:

> Any dispute arising under this Bill of Lading shall be decided in the country where the 'carrier' has his principal place of business and the law of such country shall apply except as provided elsewhere herein.

A dispute arose between the parties arising from non-delivery of the rice. The plaintiffs commenced an action in the Federal High Court in Lagos for breach of contract. The defendants objected to the jurisdiction of the Nigerian court to adjudicate on the matter. They relied on Clause 3 of the Bill of Lading to argue that the appropriate venue to litigate their dispute was Germany, not Nigeria. The Federal High Court found that the Bill of Lading provided that any disputes arising from the Bill should be submitted to the court where the carrier had its principal place of business - in this case Germany. The court also found that the dispute fell within the scope of Clause 3. Accordingly, the court granted the defendants' application for stay of proceedings in the matter. The Court of Appeal affirmed the Federal High Court's decision. On further appeal, the Supreme Court set aside the decisions of the lower courts and held that the Federal High Court should determine the matter in view of the peculiar circumstances of the case. In essence, the court held that the action should continue in Nigeria, notwithstanding the jurisdiction agreement in Clause 3 of the Bill of Lading. The Supreme Court reasoned that Nigerian courts would hold parties to their bargain and give effect to their jurisdiction agreements. However, the parties' choice of jurisdiction is not absolute. The courts have discretion to decline to give effect to jurisdiction agreements in appropriate cases. One fact the Supreme Court took into account was that the effect of staying proceedings would have permanently deprived the plaintiff of the opportunity to litigate the matter in Germany, as the cause of action was statute barred there.

[20] (1987) 4 NWLR 520.

In *Ubani v Jeco Shipping Lines* ('*Ubani*'),[21] the Court of Appeal adopted a similar approach to *Sonnar* when it refused to grant a stay to enforce a foreign jurisdiction clause on the ground that the plaintiff's action would be time-barred in the foreign court. In *Inlaks Ltd v Polish Ocean Lines* ('*Inlaks*'),[22] the Supreme Court also adopted the approach in *Sonnar* by refusing to grant a stay because the action would be time-barred in the chosen forum; the plaintiffs were resident in Nigeria as well as the evidence, and Nigeria had a real and substantial connection with the dispute involving a contract of carriage of goods by sea.[23]

From the foregoing, it could be stated that Nigerian courts are concerned with the interest of justice in deciding whether to grant a stay when an action is brought to enforce a jurisdiction clause. However, the cases of *Sonnar, Inlaks,* and *Ubani* should not be interpreted as a general rule to the effect that Nigerian courts will not grant a stay in breach of an exclusive jurisdiction agreement. These cases are exceptions to the rule and not the general rule.[24] The judge's discretion to refuse to grant a stay despite the existence of an exclusive foreign jurisdiction clause is not exercised as a matter of course; the plaintiff has to advance strong cause to the contrary as to why the discretion to grant a stay should be not exercised.

The Supreme Court emphasised this principle in *Nika Fishing Company Ltd v Lavina Corporation*,[25] where the plaintiff lost on a technical point for failing to file a counter-affidavit to the defendant's affidavit, which requested a stay of proceedings based on the existence of a foreign jurisdiction clause. In this case, the plaintiff-respondent owned a ship called the 'MV Frio Caribic' that delivered goods from Mar Del Plata, Argentina to Apapa, Lagos, Nigeria on the order of the defendant. A dispute arose between the parties because the defendant failed to take delivery of the goods whereupon the plaintiff sued for breach of contract claiming damages. The defendant entered a conditional appearance and, without taking further steps in the proceedings, applied for the court to stay proceedings on the basis that the parties, in their bill of lading contract, had agreed that an Argentinian court would have exclusive jurisdiction to resolve the dispute. The plaintiff did not file a counter-affidavit showing strong cause why the action in Nigeria, that had been brought in breach of the parties' agreement, should not be stayed. The legal burden was on the plaintiff to show strong cause as to why the proceedings should not be stayed in favour of Argentina. The Federal High Court

[21] (1989) 3 NSC 500.

[22] (1989) 3 NSC 588.

[23] See also *Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

[24] 'If all or most of such cases are to be treated as exceptions to the general rule, there is it seems to me a danger that such exceptions would be so frequent as to undermine the generality of the rule or, to put it another way, that rule will be nearly much honoured in breach as in observance' – Brandon J in *The Makefjell* [1976] 2 Lloyd's Rep 29, 32. Cited with approval by Nnamani JSC in *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR (Pt. 66) 520, 571.

[25] (2008) 16 NWLR 509. See also *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA). *Cf. Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115(CA).

and Court of Appeal, relying on *Sonnar*, held that Nigeria had a real and substantial connection to the dispute because the witnesses to resolve the case were in Nigeria, the evidence on the issue of fact was more readily available in Nigeria, and the defendants did not genuinely desire a trial in the courts of Argentina but were only seeking a procedural advantage. Consequently a stay was refused.

On appeal to the Supreme Court, the decisions of the lower courts were unanimously overturned and *Sonnar* was distinguished. The Supreme Court emphasised that where a plaintiff sues in Nigeria in breach of a foreign jurisdiction clause, Nigerian law

> requires such discretion to be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing such strong cause for not granting the application lies on the doorsteps of the respondent as the plaintiff.[26]

The burden of proof was not the other way around as had been wrongly held by the lower courts. In other words, the burden of proof is on the party that brought the action in Nigeria in breach of the foreign jurisdiction agreement, to demonstrate strong cause as to why the action should not be stayed.[27] In applying the law to the instant case, the Supreme Court held that the factors relied upon by the lower courts were not borne out by the evidence, as the defendant had filed an affidavit making reference to holding the parties to their jurisdiction clause in favour of Argentina, but the plaintiff had not filed a counter-affidavit in this regard to justify overriding that clause.

(ii) Pacta Sunt Servanda *versus Public Policy*

One significant rationale for enforcing jurisdiction clauses is that parties should respect their bargain ('*pacta sunt servanda*') to litigate in the chosen court. This enhances certainty and predictability and reduces costs, particularly in international commercial transactions. However, there are strong public policy reasons why courts retain discretion to not give effect to the parties' jurisdiction agreement.

First, the transaction may be between a stronger and weaker party, and the weaker party may not have appreciated the significance of agreeing to the jurisdiction clause. A jurisdiction clause could be the product of an adhesive contract, in respect of which the weaker party was simply left with a 'take or leave it' contract (containing the jurisdiction clause).

Second, the transaction between the parties could have a real and substantial connection to Nigeria but little or no connection to the chosen forum.

[26] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 535 (Mohammed JSC, as he then was).

[27] See also *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA); *Beaumont Resources Ltd & Anor v DWC Drilling Ltd* (2017) LPELR-42814 (CA). *Cf. Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

The implication of a Nigerian court giving effect to a foreign jurisdiction clause that does not have a significant connection to the dispute is that Nigerian courts may be deprived of the opportunity to pronounce on a matter the Nigerian State has a significant interest in. It also prevents Nigerian practitioners, arbitrators, and other interested parties from benefiting from the litigation and arbitration business in Nigeria, which, in effect, is detrimental to the Nigerian economy. This was one of the issues that arose in *Sonnar*[28] in relation to the enforcement of a German choice of court agreement. Before the Court of Appeal, Kolawole JCA (with whom other Justices agreed) vigorously expressed the view that parties must honour their agreement to observe a foreign jurisdiction clause unless strong cause is advanced to the contrary.[29] On appeal, the Supreme Court was faced with the choice between giving effect to the principle of *pacta sunt servanda* and preferencing public policy considerations against enforcement of the clause. The defendant, in asking the court to stay the proceedings, argued that the parties were bound to respect their bargain in entering into a jurisdiction clause in favour of the German courts. The plaintiff, on the other hand, argued that the transaction between the parties (carrier/shipper and consignee) was an adhesive contract and not an arm's-length bargain, where the plaintiff (consignee) was a weaker party and was left with no option but to sign the contract, and that the court, on grounds of public policy, should not enforce it. Although the Supreme Court unanimously refused to stay proceedings on the ground that the action would be statute-barred in the German courts, the majority of the Supreme Court rejected the public policy argument.[30] The rationale for the approach taken by the majority of the Supreme Court was that introducing public policy as the basis of deciding whether to enforce jurisdiction agreements would create uncertainty.[31] In addition, Eso JSC considered the parties in this case to be at arm's length as the plaintiff was too sophisticated to be an underdog.[32]

Oputa JSC, however, though agreeing with the decision reached by the majority, was sympathetic to public policy considerations against enforcing foreign jurisdiction agreements.[33] He queried whether Nigerian courts should enforce contracts containing foreign jurisdiction clauses between a stronger and weaker party. He also queried if the parties can oust the jurisdiction of the Nigerian courts by their private agreements.[34] Oputa JSC held that, as a matter of public policy, the court should not stay proceedings where the action would be time-barred in German courts and thereby shut down the plaintiff's access to the Nigerian courts.[35]

[28] (1987) 4 NWLR 520.
[29] *Sonnar (Nig) Ltd v Norwind* (1985) 3 NWLR 135, 143–46.
[30] *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520, 537–39 (Eso JSC); 540–1 (Nnamani JSC); 542 (Uwais JSC, as he then was); 542 (Kawu JSC).
[31] ibid, 535–36 (Eso JSC); 541 (Nnamani JSC); 542(Uwais JSC, as he then was); 542 (Kawu JSC).
[32] ibid, 535 (Eso JSC).
[33] ibid, 544–46.
[34] ibid, 544–46.
[35] ibid, 546.

It is submitted that the approach taken by the majority of the Supreme Court is preferable, particularly on the grounds of enhancing certainty, foreseeability, and predictability among parties to an international commercial transaction.

Furthermore, it can be argued that counsel for the parties in *Sonnar* presented the Supreme Court with a deceptive choice between the principle of *pacta sunt servanda* and public policy, as the main issue was not a choice between a principle and a policy, but the question of how to best balance two competing public policies. Indeed, 'it is against public policy to produce uncertainty in the law'[36] and 'public policy in Nigeria supports the fact that parties should be made to honour obligations entered into voluntarily between themselves'.[37] The observation of Oputa JSC is thus significant with regard to policy issues of substantive justice and mandatory norms of the Nigerian state[38] – a matter which should ordinarily be reserved for the Nigerian legislature – a point which will be shortly addressed.

It should be noted that after *Sonnar*, the Supreme Court in *Nika Fishing Company Limited v Lavina Corporation*[39] has preferred rationalising the discretionary enforcement of foreign jurisdiction clauses on grounds of *pacta sunt servanda*, subject to considerations of *forum non conveniens* and statutory limitations, rather than taking into account considerations of public policy.

(iii) Is a Choice of Court Agreement an 'Ouster Clause'?

An ouster clause strips a court of its jurisdiction. The idea that a forum selection clause ousts the jurisdiction of the Nigerian court appears to be the product of confusion of the terminology. During the military regime, Nigerian courts had to battle with ouster clauses contained in military decrees by construing them narrowly in order to give the Nigerian court jurisdiction to protect the right of access of persons who wanted to enforce their fundamental rights in the Nigerian court.[40] Viewed from this perspective, and in the eyes of constitutional law, a choice of court agreement entered into by the parties may be viewed as a private agreement to oust the jurisdiction of the court, which should not be enforced on

[36] ibid, 536 (Eso JSC).

[37] *Dale Power Systems Plc v Witt & Busch Ltd*, (2001) 33 WRN 63, 78 (Onnoghen JCA, as he then was). See in particular *Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA) 15 (Owoade JCA); *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA); *Conoil Plc v Vitol SA* (2018) 9 NWLR 489–490 (Nweze JSC); 497 (Kekere-Ekun JSC); 500 (Okoro JSC); 501–2 (Eko JSC).

[38] *Cf. Captain Tony Nso v Seacor Marine* (*Bahamas*) *Inc* (2008) LPELR-8320 (CA) 15 (Owoade JCA) – 'it is pertinent to observe that as a general rule in the relationship between national law and international Agreements, freely negotiated private international agreement, unsullied by fraud, undue influence or overwhelming bargaining power would be given full effect. *This means that, where such contract provides for a choice of forum, such clause would be upheld unless upholding it would be contrary to statute or public policy of the forum in which the suit is brought* (emphasis added).'

[39] (2008) 16 NWLR 509.

[40] See generally *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

grounds of public policy. By contrast, in the eyes of contemporary private international law, a choice of court agreement actually recognises the *existence* of a court's jurisdiction under the Constitution or enabling statute, but argues that the court *exercises* its jurisdiction by holding that it would respect and enforce the parties agreement to litigate in another court except if the plaintiff advances strong cause to the contrary.

There is no consensus among Nigerian judges as to whether a choice of court agreement ousts the jurisdiction of the Nigerian court. In the early case of *Ventujol v Compagnie Francaise De L'Afrique Occidentale*,[41] Ames J held that in a contract of employment which was entered into in France to be performed in Nigeria, where the defendant also had agents (in Nigeria), the clause for submission of disputes to a *Tribunal de Commerce de Marseilles* (a French Court at that time) was an agreement to oust the jurisdiction of the court and of no effect. Similarly, in *Allied Trading Company Ltd v China Ocean Shipping Line*,[42] the plaintiff sought to recover damages for non-delivery of goods. The defendant entered an unconditional appearance, admitted the goods were lost, and denied liability on the grounds, *inter alia*, that the court had no jurisdiction since the parties had agreed that all disputes arising under or in connection with the bill of lading should be determined in the People's Republic of China. It was held, *inter alia*, that this provision purported to oust the jurisdiction of the Nigerian court entirely and was therefore contrary to public policy.[43]

In *Sonnar,*[44] Oputa JSC held that as a matter of public policy:

> [Nigerian] Courts should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum … Courts guard rather jealously their jurisdiction and even where there is an ouster clause of that jurisdiction by Statute it should be by clear and unequivocal words. If that is so, as is indeed it is, how much less can parties by their private acts remove the jurisdiction properly and legally vested in our Courts? Our courts should be in charge of their own proceedings. When it is said that parties make their own contracts and that the courts will only give effect to their intention as expressed in and by the contract, that should generally be understood to mean and imply a contract which does not rob the Court of its jurisdiction in favour of another foreign forum.[45]

Oputa JSC's separate opinion on ouster clauses is significant because some Court of Appeal judges draw support from it in holding a forum selection clause to be

[41] (1949) 19 NLR 32.

[42] (1980) (1) ALR Comm 146.

[43] It was also held that even if this was not the case, the defendant had waived its right to object to the jurisdiction of the court by entering an unconditional appearance and taking steps in the proceedings.

[44] (1987) 4 NWLR 520.

[45] (1987) 4 NWLR 520, 544–45, approving Lord Denning's statement in *The Fehmarn* [1958] 1 All ER 333, 335. *Cf. Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489 (Nweze JSC) – 'our courts will only interrogate contracts which are designed to rob Nigerian courts of their jurisdiction in favour of foreign fora or where, by their acts, they are minded to remove the jurisdiction, properly and legally, vested in Nigerian courts.'

an ouster clause;[46] this approach is open to question because the Supreme Court had unanimously given preference to the enforcement of a foreign jurisdiction clause except where strong cause is advanced to the contrary.[47] The majority of the Supreme Court did not treat it as an ouster clause. It is incongruous to hold, on the one hand, that the Nigerian court would hold parties to their bargain in enforcing a foreign jurisdiction clause *except when strong cause is shown to the contrary*, and on the other hand, treat a foreign jurisdiction clause as if it were an ouster clause.

In later cases, however, the appellate courts in Nigeria have generally refrained from using the word 'ouster clause' and prefer holding that Nigerian courts, as a matter of discretion, would not enforce a foreign jurisdiction clause where the plaintiff advances strong cause to the contrary.[48]

Also related to the above is that Tobi JSC, in *Nika Fishing Co Ltd v Lavina Corporation*,[49] analysing the concept of ouster clauses, further (and rightly) held that Section 6 of the 1999 Constitution, which confers jurisdictional competence on various Nigerian courts, should not be interpreted as ousting the jurisdiction of foreign courts in appropriate cases such as the enforcement of jurisdiction clauses.[50]

From the foregoing, it is submitted that choice of court agreements are not ouster clauses; Nigerian courts still retain the discretion to enforce a jurisdiction clause.

(iv) Statutory Limitations on Foreign Jurisdiction Clauses

Parties cannot, by their agreement, confer jurisdiction on the Nigerian court where it does not have jurisdiction by the Constitution or an enabling statute.[51]

[46] *Cf LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA as she then was). Another problem with the adoption of Oputa's statement in *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 is that the learned Justice of the Court of Appeal failed to appreciate the distinction between a foreign jurisdiction clause and an arbitration clause.

[47] Even Oputa JSC held thus: 'Where a domestic forum is asked to stay proceedings because parties in their contract chose a foreign Court … it should be very clearly understood by our courts that the power to stay proceedings on that score is not mandatory. Rather it is discretionary which *in the ordinary way, and in the absence of strong reasons* to the contrary will be exercised both judiciously and judicially bearing in mind *each parties right to justice*' (emphasis added). The truth is that Oputa JSC's statement on ouster clauses is difficult to reconcile with the Brandon test.

[48] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR 172; *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532, 537; *Beaumont Resources Ltd v DWC Drilling Ltd* (2017) LPELR-42814 (CA). *Cf Funduk Engineering Ltd v McArthur* (1995) All NLR 157, 165 where it was observed that the fact that an agreement states that it shall be interpreted in accordance with English law (or any other law) does not in any way oust the jurisdiction of Nigerian courts to interpret or enforce the provisions of the said agreement.

[49] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509.

[50] *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 546.

[51] For example, the parties in the context of inter-State litigation cannot validly enter into a choice of clause agreement conferring jurisdiction on the High Court of the Federal Capital Territory Abuja

The significance of this point is that the enforcement of choice of court agreement is always subject to (or limited by) applicable statutory provisions; it is thus inappropriate to describe a choice of court agreement as superior to or capable of overriding a statute.[52] There are at least three Nigerian statutes that limit the effect of foreign jurisdiction clauses, namely the Civil Aviation (Repeal and Re-enactment) Act 2006, the Admiralty Jurisdiction Act,[53] and the Hamburg Rules.[54]

(a) Civil Aviation Act

The Civil Aviation Act, which came into force in 2006, governs all matters relating to civil aviation in Nigeria. It also repeals some previous statutes on the subject,[55] including the Warsaw Convention.[56] Prior to this repeal, the Warsaw Convention, 1929, which is an international treaty, had been recognised and applied as Nigerian law.[57] The Montreal Convention applies to all international carriage of persons, luggage, or goods performed by an aircraft, whether for reward or done gratuitously. 'International carriage' means a contract in which, according to the contract made by the parties, the place of departure and the place of destination are within the territories of two High Contracting States or within the territory of a single Contracting State.[58]

Article 33 of the Montreal Convention provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting parties, either before the court having jurisdiction where the carrier

where such jurisdiction is exclusively vested in the Federal High Court under s 251 of the 1999 Constitution.

[52] *Cf* 'Learned counsel submitted that the subject matter being liability for and entitlement to demurrage in a contract of carriage of goods by sea is within the jurisdiction of the Federal High Court by virtue of section 7 of the Federal High Court Act. That is rather simplistic. The clear jurisdiction clause in the bill of lading in the matter surpasses Section 7 of the Federal High Court Act' – Tobi JSC in *Nika Fishing Company Ltd v Lavina Corporation* (2008) 16 NWLR 509, 546.

[53] Originally the Admiralty Jurisdiction Decree No 59 of 1991.

[54] United Nations Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act No 19 of 2005.

[55] Section 77 of the Civil Aviation Act provides that:

'1. Subject to the provisions of subsection (2) of this section, the following enactments are hereby repealed:

   (a) Carriage by Air (Colonies, Territories and other Trust Territories) Colonial Order 1953;
   (b) Civil Aviation Act, Cap 51 LFN 1990;
   (c) Civil Aviation (Amendment) Act 1999; and
   (d) Nigerian Civil Aviation Authority (Establishment) Act, No 49 1999.

2. All regulations, byelaws, orders and subsidiary legislations made under the Civil Aviation Act 1964 (cap. 51 LFN 1990) shall continue to be in force until new regulations, bye-laws, orders and subsidiary legislation are made pursuant to this act.'

[56] Carriage by Air (Colonies, Territories and other Trust Territories) Colonial Order 1953 ('Warsaw Convention'). See s 77(1)(a) of the Civil Aviation Act. *Cf* F Majiyagbe, 'The Montreal Convention 1999 and Nigerian Law: Uncertainty, Uninterrupted' (2008) 33(4/5) *Air and Space Law* 346–55.

[57] *Swiss Air Transport Company Ltd v African Continental Bank* (1971) 1 NCLR 213.

[58] Civil Aviation Act, s 48(1) and Schedule 2.

is domiciled or has his or her principal place of business, or where the carrier has a place of business through which the contract was made, or before the court having jurisdiction at the place of destination.[59] The use of the word 'must' denotes a mandatory provision. In other words, a court is bound to refuse the enforcement of a foreign jurisdiction clause that is contrary to Article 33 of the Montreal Convention; the Nigerian court has no discretion in the matter. In *Swiss Air Transport Company Ltd v African Continental Bank*,[60] the Supreme Court, in interpreting Section 28 of the Warsaw Convention (which is *in pari materia* with Section 33 of the Montreal Convention), held that parties cannot override the provisions of Section 28 by purporting to submit to the court's jurisdiction, so that even if the defendant waives its right to protest jurisdiction at the trial court, the issue of jurisdiction can be validly raised at the appellate stage to divest the trial court of jurisdiction.

The Montreal Convention is a useful international instrument to protect consumers as weaker parties who board an airline, or transport goods using an airline. When consumers purchase airline tickets, they may not really appreciate the significance of a foreign jurisdiction clause contained in it, and even if they appreciate the significance of the foreign jurisdiction clause, most consumers do not have the luxury to negotiate such a clause. In practice, it would be almost unthinkable to negotiate such a clause.

The Civil Aviation Act also implements the Convention on International Interests in Mobile Equipment.[61] The Convention applies to the proprietary interest and right of title in an aircraft.[62] Article 42 provides that the courts of a Contracting State chosen by the parties, in respect of a claim brought under the convention, shall have exclusive jurisdiction (except otherwise provided by the parties), whether or not the forum has connection with the parties or the transaction.[63] This provision is mandatory – accordingly, if the parties choose another Contracting State as the jurisdiction in which to litigate (that is not Nigerian), the Nigerian court is bound to enforce such an agreement even though the dispute has a real and substantial connection with Nigeria; the Nigerian court has no discretion in the matter.[64] The constitutionality of this provision remains a question for the Nigerian courts to determine under Section 6 of the 1999 Constitution (which grants the parties access to the Nigerian courts), as ratified international statutes are subject to the Nigerian Constitution.

[59] This is quite similar to Article 28 of the Warsaw Convention except that one of the connecting factors used in determining the jurisdiction to sue the carrier is actually its ordinary residence rather than its domicile, as used in the Montreal Convention.

[60] (1971) 1 NCLR 213.

[61] Convention on International Interests in Mobile Equipment, 2001. See s 73(2) and Schedule 5 of the Civil Aviation Act.

[62] See the Preamble and Article 1.

[63] This is subject to Articles 43 and 44 of the Convention.

[64] However, the issue as to whether this provision, which strips the Nigerian court of its constitutional powers in exercising discretion to enforce a forum selection clause, is an ouster clause, is a moot point.

(b) Hamburg Rules

The Hamburg Rules are contained in an international convention that has been incorporated into Nigerian law.[65] It repeals the Hague Rules, 1924,[66] and governs agreements relating to carriage of goods by sea.[67] Article 21 provides for the mandatory fora in which the plaintiff has to institute an action. They are stated as follows:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
(b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
(c) the port of loading or the port of discharge; or
(d) any additional place designated for that purpose in the contract of carriage by sea.

The parties cannot validly contract out of the above-specified options in relation to foreign jurisdiction clauses, except if the agreement was entered into after a dispute arises.[68] There is much to commend about the drafting of the Hamburg Rules. First, they clearly stipulate, without any ambiguity, the mandatory fora which a plaintiff can institute an action in, which the parties cannot derogate from by a foreign jurisdiction clause. Second, the specified fora from which the plaintiff has an option to choose in instituting an action would likely have a significant connection with a contract of carriage by sea. Third, restricting the option to enter into a foreign jurisdiction clause after a dispute arises strikes a reasonable balance between the needs of legal and commercial certainty and the need to protect weaker parties in this type of transaction.

(c) Admiralty Jurisdiction Act

The Admiralty Jurisdiction Act (the 'AJA') Section 1 gives the Federal High Court exclusive jurisdiction which includes:

(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Act;

[65] United Nations Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act No 19 of 2005.

[66] Article 31(1) of the Hamburg Rules provides that upon becoming a contracting state to the Hamburg Rules, any state party to the Hague Rules, 1924 must make a declaration of its denunciation of the Hague Rules 1929, which is to take effect when the Hamburg Rules comes into effect in respect of that State. Prior to the coming into force of the Hamburg Rules, Nigerian courts have applied the Hague Rule 1924, in *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495. It should also be noted that The Hague Rules, 1924 contain no provision on forum selection clauses.

[67] See the Preamble to the Hamburg Rules.

[68] Article 21(5) of the Hamburg Rules. However, under Article 22(2) a Contracting State may assume jurisdiction where a vessel is arrested within its jurisdiction, but the defendant may apply to the court for an order that the plaintiff should move its case to one of the above-specified venues subject to providing security for costs, in anticipation of a potential judgment that would be awarded in the plaintiff's favour.

(b) any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Act;
(c) any jurisdiction connected with any ship or aircraft which is vested in any other court in Nigeria immediately before the commencement of this Act;
(d) any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property;
(e) any claim for liability incurred for oil pollution damage;
(f) any matter arising from shipping and navigation on any inland waters declared as nation waterways;
(g) any matter arising within a Federal port or national airport and its precincts, including claims for loss of or damage to goods occurring between the off-loading of goods across space from a ship or an aircraft and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee;
(h) any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer;
(i) any cause or matter arising from the constitution and powers of all ports authorities, airport authority and the National Maritime Authority; and
(j) any criminal cause and matter arising out of or concerned with any of the matters in respect of which jurisdiction is conferred by paragraphs (a) to (i) of this subsection.

Section 20 of the AJA appears to provide for mandatory jurisdiction of the Federal High Court in admiralty matters by providing that:

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

Contrary to the views expressed by some Nigerian appellate judges, that the provisions of Section 20 of the AJA are clear and unambiguous,[69] it is submitted here that Section 20 of the AJA is by no means clear and unambiguous.[70] It could be argued that Section 20 is a product of inadequate legislative drafting and the inability of the draftsman to appreciate the subject of private international law.[71] The ambiguity created by Section 20 of the AJA is also evidenced by the fact that Nigerian appellate judges and scholars have given varied interpretations to it. Thus, it has been suggested that, first, the draftsman meant that a forum selection clause is null and void because it ousts the jurisdiction of the Nigerian court;[72] second, it applies only to a jurisdiction clause and not to an arbitration clause;[73] third, under Article 20 (a)–(g), the court cannot enforce a foreign jurisdiction clause when any of the factors listed in that subsection are present, but Article 20(1)(h) gives the court a limited measure of discretion (where the factors in Article 20(a)–(g) are not present);[74] fourth, the provisions of Section 20 of the AJA do not apply to domestic arbitration clauses, but invalidates international arbitration agreements (and foreign jurisdiction clauses);[75] and fifth, forum selection clauses are valid to the extent that the Federal High Court retains discretion while considering the provisions of Article 20(a)–(h) in deciding whether to enforce it.[76]

Another problem with the drafting of Section 20 of the AJAis that it did not take into account the conflicting provisions of Section 10. Section 20 appears to conflict with Section 10 insofar as Section 10 recognises the discretion of the Federal High Court to decline jurisdiction and stay proceedings in favour of another forum, which could be on the basis of a foreign jurisdiction clause or an arbitration clause in Nigeria or elsewhere.

Also, the coming into effect of the Hamburg Rules, - a later convention which governs contracts for the carriage of goods by sea and gives the plaintiff more mandatory options of fora to explore in seising a court - renders the effect of

[69] *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13 (Galadima JCA); *LAC v AAN Ltd* (2006) 2 NWLR 49, 71–73 (Garba JCA), 77 (Ogunbiyi JCA as she then was).

[70] It has been described as 'Walking on its head, a section that was wrongly thought out and badly drafted, an inappropriate provision of the law whose meaning cannot be comprehended'– Uwaifo JCA (as he then was) in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (1993–1995) 4 NSC 182, 200.

[71] For an interesting analysis see HA Olaniyan, 'Conflict of Laws and An Enlightened Self Interest Critique of Section 20 of the Admiralty Jurisdiction Act of Nigeria' (2012) 1 *NIALS International Journal of Legislative Drafting* 22, 29–38.

[72] *Cf LAC v AAN Ltd* (2006) 2 NWLR 49, 73. See also *Hull Blyth (Nig) Ltd v Jetmove Publishing Ltd* (2018) LPELR-44115 (CA).

[73] HA Olaniyan, 'Conflict of Laws and an Enlightened Self Interest Critique of Section 20 of the Admiralty Jurisdiction Act of Nigeria' (2012) 1 *NIALS International Journal of Legislative Drafting* 22, 49.

[74] ibid, 48.

[75] *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13–14 (Galadima JCA).

[76] Uwaifo JCA (as he then was) in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (1993–1995) 4 NSC 182 at 200. See also *Onward Enterprises Ltd v MV 'Matrix'* (2010) 2 NWLR (Pt. 1179) 530.

Section 20 of the AJA nugatory in matters relating to carriage of goods by sea under Article 21. It is submitted that since the Hamburg Rules potentially conflict with the AJA in relation to matters pertaining to carriage of goods by sea, if the court is called upon to resolve the inconsistency in both provisions, the court should hold the Hamburg Rules to prevail on the basis that it is a later statute of the National Assembly,[77] is a ratified international treaty, and its provisions, which are specific, should override a general statute on admiralty jurisdiction like the AJA.[78] The same position should also apply in relation to Article 42 of the Convention on International Interests in Mobile Equipment, an international treaty that governs title or proprietary interest in an aircraft, since the Federal High Court is bound to enforce the court chosen by the parties insofar as that court is in a Contracting State.

To date, the Supreme Court has not authoritatively interpreted Section 20 of the AJA.[79] The opportunity was missed on at least one occasion.[80] Since a foreign jurisdiction clause is *not* an ouster clause, it is also recommended that, pending such time as Section 20 of the AJA is repealed or amended by the Nigerian legislature, Nigerian courts should regard the provisions of Section 20 of the AJA as factors to be taken into account in giving effect to a foreign jurisdiction clause. This would also bring the court's interpretation into line with other statutory provisions that appear to conflict with Section 20 of the AJA.

It is recommended that Section 20 of the AJA be repealed or amended to the effect that a court shall not enforce a jurisdiction clause where the dispute under the AJA has a real and substantial connection with Nigeria. This approach would reconcile the needs of legal and commercial certainty and also the need to take into account the general public policy objective of not easily stripping the Nigerian court of jurisdiction in a matter it truly has a significant interest in. This would also be consistent with the needs of comity; it would avoid a situation where the Nigerian court exercises jurisdiction in breach of a choice of court agreement, only to have a foreign court[81] issue an anti-suit injunction that aims to compel the

[77] *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13 (Galadima JCA). The same argument should also extend to the Hague Rules, 1929.

[78] *Schroeder & Co v Major and C Ltd* (1989) 2 NWLR (Pt. 101) 1. *Cf MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13 (Galadima JCA).

[79] The observation by Adekeye JSC in *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 531–32 to the effect that s 20 of the AJA 'has virtually removed the element of courts' discretion in deciding whether or not to uphold a foreign jurisdiction clause', despite being of persuasive value, is not binding on lower courts as it was not the *ratio decidendi* of the case.

[80] *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469, 484–89 (considered in the Court of Appeal – *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (1993–1995) 4 NSC 182, but not the Supreme Court). See also *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105.

[81] See *Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm) in the English High Court, where in defence against a claim for an anti-suit injunction restraining the defendant from continuing proceedings in Nigeria, the defendant argued that the Nigerian court had mandatory jurisdiction under s 20 of the AJA. Blair J held that this was not proved as a matter of fact; also, that even assuming it was proved, the English court would still issue the anti-suit injunction on the basis that even if

plaintiff in Nigeria to discontinue the Nigerian proceedings. The possibility of a foreign court issuing an anti-suit injunction is among the factors that may be taken into account in redrafting Section 20 of the AJA; it should by no means be decisive, however, since the Nigerian court is part of a sovereign.

B. Third Parties and Jurisdiction Agreements

In Nigerian law, subject to certain exceptions, a contract cannot confer rights or impose obligations except on parties to the contract.[82] The same position applies with full force to a jurisdiction selection clause contained in a contract. In *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd*,[83] the plaintiff-appellants hired a ship from the defendant-respondent to carry a cargo of bunker fuel from Port Harcourt to Lagos. A tanker, 'Prima Jemima', was chartered by the defendant-respondent to a Swiss company called Monte Cristo Transport and Trading SA ('Monte Cristo'). Monte Cristo sub-chartered the 'Prima Jemima' to the second plaintiff-appellant. The second plaintiff-appellant then gave use of it to the first plaintiff-appellant for bunkering services within Nigerian territorial waters. The first and second plaintiff-appellants did not enter into a charter party agreement. A monetary dispute subsequently arose between the defendant-respondent and Monte Cristo. It was alleged that the defendant-respondent took the law into its own hands by ordering the captain of 'Prima Jemima' to abscond from Nigerian waters with the property of the plaintiff-appellants on board. The plaintiff-appellants brought an action against the defendant-respondent in the tort of conversion for damages. The defendant-respondent did not enter an appearance to defend the action despite being served out of jurisdiction. The High Court held that it had no jurisdiction by relying on clause 40 of the charter party agreement that the plaintiff-appellants were not a party to. The plaintiff appealed and the Court of Appeal allowed the appeal. Ademola JCA, in delivering the leading judgment of the Court (with whom other Justices of the Court Appeal agreed), rightly held as follows:

> The jurisdiction clause is contained in a contract between Prima Tankers and Monte Cristo. Can that jurisdiction clause be relevant to an action brought in tort by a third party against one of the parties to that contract? Clearly, there is no privity of contract between Prima Tankers Limited and either of the appellants in the present action based on the aforesaid charter. The claim is based *on a tort* and not a *charter*.[84]

foreign law was to have effect in a foreign territory to give the foreign court exclusive jurisdiction, it would not prevent the English court from issuing an anti-suit injunction. Blair J also reasoned that since the parties had entered into an English exclusive choice of court agreement, the English court should mandate the parties to comply with it.

[82] *Ikpeazu v African Continental Bank Ltd* (1965) NMLR 376.

[83] (1986) 5 NWLR 532.

[84] *Unipetrol Nigeria Ltd v Prima Alfa Enterprises (Nig) Ltd* (1986) 5 NWLR 532, 537.

C. Severability

There are situations where issues may be raised regarding the validity of the contract between the parties. One party may argue the contract is invalid due to factors such as incapacity, lack of requisite consent, illegality, mistake, misrepresentation, fraud, duress, and undue influence.[85] Such a situation raises the question whether the Nigerian court should pronounce on the validity of the entire contract (including the jurisdiction clause) or decline jurisdiction - in favour of the chosen court - to make a pronouncement on the validity of the entire contract. There now appears to be an international consensus on the subject of severability in foreign jurisdiction agreements, which recognises a jurisdiction clause as separate from the rest of the terms of the contract.[86]

It is not uncommon for parties to provide for matters relating to severability in their contractual transaction, which the Nigerian court should ordinarily enforce. Generally, the court should decline jurisdiction in favour of the foreign court the parties have chosen to determine whether the contract itself is valid. The rationale for this position is mainly based on legal and commercial certainty. If parties were allowed to easily invoke the jurisdiction of the Nigerian court in breach of a foreign jurisdiction clause on the basis that the contract containing the foreign jurisdiction clause is invalid, parties who do not wish to respect the sanctity of their agreement could easily evade their obligations under such agreements. As an exception, the Nigerian court should not enforce a choice of court agreement where it may lead to injustice and the interest of weaker parties may not be protected.

Under the Hamburg Rules, where the parties enter into a contract which violates the Hamburg Rules, the entry into a foreign jurisdiction clause (at least after the dispute arises) to resolve the matter before the chosen court would not nullify the forum selection clause for violating any of the provisions of the Hamburg Rules.[87]

D. Interim Measures to Protect a Foreign Jurisdiction Clause

We have not come across a Nigerian case in which interim remedies, such as an anti-suit injunction, have been granted in respect of a foreign jurisdiction clause.[88] Given that these are remedies Nigerian courts routinely provide at common law

[85] See also *Sodipo v Lemminkainen* (No 2) (1986) 1 NWLR (Pt. 15) 220, *Thirwell v Oyewumi* (1990) 4 NWLR (Pt. 144) 384; *ACB Ltd v Alao* (1994) 7 NWLR (Pt. 358) 614.

[86] See Articles 2(d), 2(3) and 5 of the Hague Convention on Choice of Court Agreements 2005 and Article 25 of the Brussels I Regulation Recast.

[87] Article 23(1) of the Hamburg Rules.

[88] For an extensive and interesting analysis see AA Olawoyin, 'Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bill of Lading' (2006) 17 *The American Review of International Arbitration* 239, 252–54, 265–67.

for breach of contract, it is arguable that Nigerian courts can also grant them in respect of a foreign jurisdiction clause. Indeed, a stay of proceedings will often have the effect of an order of specific performance.

The Nigerian courts also have power to grant anti-suit injunctions, which can be used to protect jurisdiction agreements, especially if the parties have agreed on Nigeria as their chosen forum.[89]

A jurisdiction agreement is certainly a unique contractual term but there is no reason, in principle, why its breach cannot be visited with the usual sanction of damages.[90] Given the novelty of these issues, Nigerian courts should develop the common law in ways that advance international commerce without sacrificing the goals of legal certainty and predictability.

E. The Hague Convention on Choice of Court Agreements

Nigeria does not have a comprehensive statute regarding choice of court agreements in the same way that it has for arbitration agreements. The Hague Convention on the Choice of Court Agreements (the 'Hague Choice of Court Convention') is a comprehensive international treaty devoted to the enforcement of exclusive choice of court agreements in international matters. It is recommended that Nigeria, which is currently not a party to the Hague Convention, ratify the Convention, as it promotes legal certainty and commercial effectiveness in international trade and investment through enhanced judicial cooperation, by creating uniform rules on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters.[91] The Hague Choice of Court Convention also recognises the concept of severability of a choice of court agreement.[92] It does not deprive Member States of the right to issue protective remedies in protection of choice of court agreements, such as anti-suit injunction and damages.[93]

The Hague Choice of Court Convention reconciles the requirements of legal and commercial certainty with the need to protect weaker parties by providing that it does not apply to consumer and employment contracts.[94] In this regard, the Convention also takes into account the mandatory and public policy norms of a state and provides a significant list of circumstances where it does not apply to choice of court agreements.[95] A Contracting State could legislate on specific matters where it does not want the Convention to apply in relation to choice of

[89] See generally *United Bank of Africa v Ade Coker* (1996) 4 NWLR 239.

[90] *Cf* AA Olawoyin, 'Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bill of Lading' (2006) 17 *The American Review of International Arbitration* 239, 252–54, 265–67.

[91] Hague Choice of Court Convention, Preamble and Article 8.

[92] ibid, Art 3(d). See also Article 2(3) and Article 5.

[93] ibid, Art 7.

[94] ibid, Art 2(1).

[95] ibid, Art 2(2).

court agreements.[96] In addition, a Contracting State may refuse to enforce a choice of court agreement or a judgment arising from a choice of court agreement that the enforcing Contracting State has a strong connection with.[97]

The Hague Choice of Court Convention encourages Member States to interpret its provisions uniformly by respecting its international character.[98] It also provides a list of factors the Contracting States can utilise to avoid incompatibility with their existing statutes (particularly on choice of court agreements).[99] In addition, the Convention allows states to either sign up as a Contracting State, or as part of a regional body.[100] There is also opportunity to review the Hague Convention at regular intervals by the Secretary-General of the Hague Conference on Private International Law.[101]

It is hoped that just as Nigeria has ratified the New York Convention on arbitration, it will also ratify the Hague Convention.

III. Foreign Arbitration Clauses

An arbitration clause is an agreement between the parties to arbitrate disputes arising between them. Nigerian courts have generally demonstrated a positive attitude towards mandating that parties to a domestic or international arbitration agreement honour the terms of their agreement. Foreign arbitration clauses are further discussed below.

A. Stay of Proceedings in Favour of Arbitration

Sections 4 and 5 of the Arbitration and Conciliation Act[102] (the 'ACA') provide that the court has the power to stay proceedings if the defendant, at the time of appearance and before taking other steps in the proceedings,[103] requests that the court stay the proceedings and refer the parties to arbitration on the basis that:

> there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and the applicant was at the time when the

[96] ibid, Art 19. The Admiralty Jurisdiction Act is a good example.
[97] ibid, Art 20.
[98] ibid, Art 23.
[99] ibid, Art 26.
[100] ibid, Arts 27, 29, 30.
[101] ibid, Art 24.
[102] Originally Decree No 11 of 1988, entered into force 14 March 1988. There are other State arbitration laws modelled after the Federal law, but this work does not discuss them.
[103] See generally *Confidence Insurance Ltd v The Trustees of the Ondo State College of Education Staff Pension* (1999) 2 NWLR (Pt. 591) 373, 386–87; *Akpaji v Udemba* (2003) 6 NWLR (Pt. 815) 169; *Williams v Williams* (2013) 3 CLRN 114; *LSWC v Sakamori (Nig) Ltd* (2011) 12 NWLR (Pt. 1262) 569; *Sino-Africa Agriculture & Ind Company Ltd v Ministry of Finance Incorporation* (2013) LPELR-22379 (CA) 1, 33–36; *SCOA (Nig) Plc v Sterling Bank Plc* (2016) LPELR-40566 (CA). Other steps could include entering an unconditional appearance and the filing of court processes to defend the case on its merits.

> action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration ….[104]

Sections 4 and 5 of the ACA envisage two main situations. The first is that a party institutes proceedings before the Nigerian court in breach of an arbitration agreement where proceedings are already pending before an arbitral tribunal, ie a situation of *lis alibi pendens*. The second is where proceedings are commenced before the Nigerian court in breach of an arbitration agreement and no proceedings are pending before a foreign arbitral tribunal.

Nigerian courts, in applying Sections 4 and 5 of the ACA, have proved to be generally arbitration-friendly in enforcing arbitration agreements in a bid to promote party autonomy, alternative dispute resolution, and domestic and international commerce.[105] In this regard, the courts have usually held, under Sections 4 and 5 of the ACA, that the consideration of a referral of a matter to arbitration is a condition precedent to the exercise of a court's jurisdiction.[106] Also, the Supreme Court, in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd*,[107] held that the court is bound to stay the proceedings under Sections 4 and 5 of the ACA unless there are exceptional grounds, such as where the defendant establishes that it would suffer injustice if the case were stayed, that it cannot obtain justice from the arbitral tribunal, or that the agreement between the parties is null and void, inoperative, and incapable of being performed.[108] It is, however, open to question whether these grounds that the Supreme Court refers to in Sections 4 and 5 of the ACA are consistent with Nigeria's international obligations under Article II(3) of the New York Convention, which contains more *limited grounds for not staying proceedings*.[109] Moreover, the grounds upon which the Supreme Court

[104] It is not very clear if ss 4 and 5 of the ACA apply only to domestic arbitration, or both domestic and international arbitration. It is submitted here that the approach of Nigerian courts to applying ss 4 and 5 to international arbitration is preferred. Moreover, s 43 of the ACA provides that its provisions in Part II shall apply *solely* to cases relating to international commercial arbitration. This implies that Part I (containing ss 4 and 5 of the ACA) applies to domestic and international arbitration.

[105] *OSHC v Ogunsola* (2000) 14 NWLR (Pt. 687) 431; *Engineer Frank v Colonel Abdu Ltd* (2003) FWLR (Pt. 158) 1330, 1355–56; *Onuselogu Ent Ltd v Afribank (Nig) Ltd* (2005) 1 NWLR (Pt. 940) 577; *Maritime Academy of Nigeria v AQS* (2008) All FWLR (Pt. 406) 1872; *Onward Enterprises Ltd v MV 'Matrix'* (2010) 2 NWLR (Pt. 1179) 530; *LSWC v Sakamori (Nig) Ltd* (2011) 12 NWLR (Pt. 1262) 569; *Stat Oil Nigeria Ltd v Nigerian National Petroleum Company* (2013) 14 NWLR 1; *BSG Energy Holdings Ltd v Spear* (2013) 4 CLNR 49; *Williams v Williams* (2013) 3 CLRN 114; *Sino-Africa Agriculture & Ind Company Ltd v Ministry of Finance Incorporation* (2013) LPELR-22379 (CA). See *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR (Pt. 520) 224, 248; *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469; *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 14 (Galadima JCA); *Transocean Shipping Ventures Private Ltd v MT Sea Sterling* (2018) LPELR-41508 (CA).

[106] *Confidence Insurance Ltd v The Trustees of the Ondo State College of Education Staff Pension* (1999) 2 NWLR (Pt. 591) 373; *Onward Enterprises Ltd v MV 'Matrix'* (2010) 2 NWLR (Pt. 1179) 530; *LSWC v Sakamori (Nig) Ltd* (2011) 12 NWLR (Pt. 1262) 569.

[107] (2003) 15 NWLR 469.

[108] *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469, 490–91.

[109] 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the

stated that the court can stay proceedings in breach of a foreign arbitration agreement are not *expressly* provided in Sections 4 and 5 of the ACA.

In *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd*,[110] the plaintiff instituted an action at the Federal High Court, Lagos for damages for loss it suffered as charterer of the defendant's ship. The plaintiff also applied *ex parte* for arrest of the defendant's ship, which was granted. The defendant, on becoming aware of the proceedings applied to the trial court, prayed for the court to set aside its order and to stay proceedings on the ground that the parties were already the subject of arbitration proceedings in London pursuant to their arbitration agreement, and that the plaintiff had made a counter-claim in the arbitral tribunal against the defendant – a matter that was not brought to the attention of the trial court by the plaintiff at the *ex parte* stage. The plaintiff contested the defendant's claim vigorously. The trial court and the Court of Appeal ruled in favour of the plaintiff.[111] On appeal, the Supreme Court interfered with the discretion of the two lower courts and overturned their concurrent findings. The Supreme Court reasoned that the approach of generally staying proceedings under Sections 4 and 5 of the ACA, where the matter is already pending before an arbitral tribunal, was arbitration-friendly and commercially sensible as it reduced the possibility of conflicting jurisdiction between the Nigerian court and the arbitral tribunal. The Supreme Court also regarded the conduct of the plaintiff as an abuse of the court's process.[112]

However, it should be noted that some Nigerian courts have failed to understand the meaning of Sections 4 and 5 of the ACA in at least two different contexts. The first is that some Nigerian courts have wrongly held that a party applying for a stay of proceedings of an action, pending reference to arbitration, must show, in his affidavit evidence in support of the application, by means of documentary evidence, the steps he took or intends to take for the proper conduct of the arbitration in order to succeed under Section 5 of the ACA, so that it is not enough for the applicant-defendant to merely depose to an affidavit stating that he is willing and ready to do all things for the proper conduct of the matter by arbitration.[113] First, this interpretation clearly violates Nigeria's international obligation in the enforcement of foreign arbitration clauses under Article II(3) of the New York Convention

parties, refer the parties to arbitration, unless it finds that the said agreement *is null and void, inoperative and incapable of being performed*' (emphasis added).

[110] (2003) 15 NWLR 469.

[111] Note that the Court of Appeal's decision was based on s 20 of the AJA regarding mandatory jurisdiction – *Owners of MV Lupex v Nigerian Overseas Chatering and Shipping Ltd* (1993–1995) 4 NSC 182, which was not considered by the Supreme Court on appeal.

[112] 'It seems to me that, the said respondent having voluntarily submitted to arbitration as contracted by the parties, it was an abuse of the process of the court for it to institute a fresh suit in Nigeria against the appellant in respect of the same dispute during the pendency of the arbitration proceedings unless there was a strong compelling and justifiable reason for such an action' – *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469, 490–91 (Iguh JSC).

[113] *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR (Pt. 865) 1, 15–16 (Galadima JCA); *United Bank for Africa v Trident Consulting Ltd* (2013) 4 CLRN 119.

on arbitration. Second, this interpretation is not supported by the express words of Sections 4 and 5 of the ACA, which are clear and unambiguous.[114] Thirdly, this interpretation appears to contradict the approach of the Supreme Court in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd*,[115] which requires that the court enforce the arbitration agreement except if there are strong reasons why it should not stay the proceedings. In other words, requesting that the applicant provides documentary evidence under Section 5(2)(b) as one of the conditions for enforcing the arbitration clause appears to shift the burden to the applicant-defendant, rather than the plaintiff-respondent who has sued in breach of the agreement to arbitrate. Fourth, this interpretation appears to violate Section 12(1) of the ACA, which recognises the power of the arbitral tribunal to determine its own jurisdiction.

The second is that some Justices of the Court often confuse the Brandon test in relation to foreign jurisdiction clauses and apply it to arbitration agreements.[116] Fatayi-Williams JSC (as he then was) stated the law correctly when he held that although at common law, the court has no jurisdiction to stay proceedings that are brought in breach of an arbitration clause, the court has jurisdiction to stay proceedings by virtue of its powers under Section 5 of the Arbitration and Conciliation Act.[117] The Brandon test is *truly* aimed at staying proceedings on the basis of *forum non conveniens* in favour of a *foreign court* chosen rather than an *arbitral tribunal*. An arbitration clause and a jurisdiction clause, though having the same purpose of designating a predictably foreseeable forum where the parties could litigate or arbitrate in the event of a dispute, are also conceptually different in Nigerian law when it comes to the court considering whether to stay proceedings in favour of another forum. The discretion a judge exercises in the case of an arbitration clause is statutory, while the discretion the judge exercises in the case of a foreign jurisdiction clause is essentially derived from common law.

B. Is an Arbitration Agreement an Ouster Clause?

Given the Nigerian court's positive attitude towards the enforcement of domestic and foreign arbitration clauses, such clauses are not categorised as ouster clauses. The Supreme Court, in a significant number of cases, has held that a foreign or domestic arbitration clause is not an ouster clause.[118] Nigerian courts adopt this

[114] See generally *Attorney-General of the Federation v Guardian Newspapers* (1999) NWLR (Pt. 618) 187, 264; *Araka v Egbue* (2003) 17 NWLR (Pt. 848) 1 on literal interpretation.

[115] (2003) 15 NWLR 469, 488.

[116] Uwaifo JCA (as he then was) in *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (1993–1995) 4 NSC 182, 198–99; *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469, 484–89 (Mohammed JSC); *LAC v AAN Ltd* (2006) 2 NWLR 49, 79–80 (Ogunbiyi JCA as she then was).

[117] *Obembe v Wemabod Estates* (1977) 5 SC 115, 131.

[118] *Obembe v Wemabod Estates* (1977) 5 SC 115, 128–31; *KSUDB v Fanz Ltd* (1986) 5 NWLR (Pt. 39) 74, 86; *Confidence Insurance Ltd v The Trustees of the Ondo State College of Education Staff Pension*

position on the basis that an arbitration agreement does not prevent the parties from resorting to the court. In other words, parties could resort to the Nigerian court for protective remedies or obtaining security for costs for an eventual arbitral award.[119] The Nigerian courts adopt this approach on the basis of honouring the aim of the ACA, which recognises and respects the parties' right to choose a forum to arbitrate.

The Nigerian Supreme Court has also held that it can enforce a special type of arbitration clause referred to as a *Scott v Avery* clause,[120] which is subject to statutory limitations.[121] This point is significant. The *Scott v Avery* clause is a provision in an arbitration agreement specifying that an arbitral award is a condition precedent to instituting an action in court, so that time only begins to run (for the purposes of statutes of limitation) after an arbitral award has been reached; if there is no such clause, time begins to run immediately the cause of action arises. However, the effect of a *Scott v Avery* clause can be limited by statute. In *City Engineering (Nig) Ltd v Federal Housing Authority*,[122] the Supreme Court observed that although the *Scott v Avery* clause was inapplicable on the facts of the instant case because the parties had not inserted the term into their contract, even if the *Scott v Avery* clause *was* a term of the parties' contract, Sections 8(1)(d) and 63 of the Limitation Law of Lagos would have rendered it inapplicable such that time would have begun to run when the cause of action arose rather than when the arbitral tribunal made an award.

The Supreme Court has interpreted the *Scott v Avery* clause as one that either postpones the resort to litigation or is utilised by the defendant as a defence to an action,[123] but has held that it should not be interpreted as an

(1999) 2 NWLR (Pt. 591) 373; *African Insurance Development Corporation v Nigeria Liquified Natural Gas Limited* (2000) 4 NWLR 494, 505; *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2007) 11 NWLR (Pt. 1097) 182. See also *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1; *Sino-Africa Agriculture & Ind Company Ltd v Ministry of Finance Incorporation* (2013) LPELR-22379 (CA) 1, 36; *SCOA (Nig) Plc v Sterling Bank Plc* (2016) LPELR-40566 (CA); *Transocean Shipping Ventures Private Ltd v MT Sea Sterling* (2018) LPELR-41508 (CA).

[119] *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105; *LAC v AAN Ltd* (2006) 2 NWLR 49, 74.

[120] *Scott v Avery* (1856) 5 HL Cas 811 is a case where the House of Lords held that an arbitration agreement which provided that aggrieved employees could only resort to the court when an arbitration award has been reached was not illegal as ousting the jurisdiction of the court. See generally *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) 12 SC 1, 6–9 (Elias CJN); *Obembe v Wemabod Estates* (1977) 5 SC 115, 128–31 (Fatayi-Williams JSC, as he then was); *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR 224, 245–46 (Ogundare JSC), 247–48 (Uwais CJN), 248 (Belgore JSC, as he then was), 249 (Wali JSC), 249–50 (Kutgi JSC), 250–2 (Ogwegbu JSC), 252–54 (Onu JSC); *African Insurance Development Corporation v Nigeria Liquified Natural Gas Ltd* (2000) 4 NWLR 494, 505 (Ayoola JSC).

[121] *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR 224, 245–46 (Ogundare JSC), 247–48 (Uwais CJN), 248 (Belgore JSC, as he then was), 249 (Wali JSC), 249–50 (Kutgi JSC, as he then was), 250–52 (Ogwegbu JSC), 252–54 (Onu JSC).

[122] ibid.

[123] The *Scott v Avery* clause takes two forms: (1) An express or implied term of the contract that no action shall be brought until arbitration has been conducted and an award made; (2) A provision that the only obligation of the defendant shall be to pay such sum as the arbitrator shall award. *African Insurance Development Corporation v Nigeria Liquified Natural Gas Ltd* (2000) 4 NWLR 494,

ouster clause.[124] If a *Scott v Avery* clause is not regarded as an ouster clause by the Supreme Court, it follows that Nigerian courts should not treat other arbitration clauses as ouster clauses.

From the foregoing, it is submitted that the Court of Appeal's decision in *Lignes Ariennes Congolaises (LAC) v Air Atlantic Nigeria (LAN) Ltd*[125] is open to question. In that case, the defendant-appellant was an airline and national carrier of Congo, which had its head office in Congo, and had operational offices in Lagos, Nigeria. The defendant-appellant entered into an aircraft leasing agreement with the plaintiff-respondent, which was a Nigerian company. A dispute arose between the parties and the plaintiff-respondent brought an action against the defendant in the Nigerian courts. One of the issues the Court of Appeal considered was whether Article 7 of the parties' agreement was an ouster clause and therefore null and void under Section 20 of the AJA.[126] Article 7 of the parties' agreement provided as follows:

> The present agreement shall be governed by Congolese Positive Law. Any dispute relating to the execution, the interpretation and/or termination of the present agreement shall be settled in a friendly way between the parties. If they fail to do so, the dispute shall be referred to arbitration by both Presidents of Kinshasa and Lagos Bars.

The Nigerian Court of Appeal, with due respect, *appears* to have construed the above provision as an ouster clause and therefore null and void in accordance with Section 20 of the AJA.[127] The Court may also have fallen into this error because it wrongly equated a choice of law agreement with a choice of court agreement.[128] It is also important to note that the leading judgment of Garba JCA on this issue was contradictory and therefore made the judgment of the Court of Appeal difficult to appreciate. First, Garba JCA rightly held as follows:

> Though the appellant had made heavy weather about the arbitration clause contained in the lease agreement between the parties in his brief of argument, the lower court did not make any finding or pronouncement on it. In any event the arbitration clause did not seek to oust the jurisdiction of the court all it did was to allow parties avenues and possibilities of settling their disputes amicably out of court. The position of the

505 (Ayoola JSC). Ayoola JSC also expressed the view that the use of the phrase 'exclusive and final' to indicate that a matter should be resolved by arbitration is also a form of *Scott v Avery* clause. *Cf MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13 (Galadima JCA).

[124] *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) 12 SC 1, 6–9 (Elias CJN): *Obembe v Wemabod Estates* (1977) 5 SC 115, 128–31 (Fatayi-Williams JSC, as he then was); *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR 224, 245–46 (Ogundare JSC), 247–48 (Uwais CJN), 248 (Belgore JSC as he then was), 249 (Wali JSC), 249–50 (Kutgi JSC, as he then was), 250–52 (Ogwegbu J.S.C), 252–54 (Onu JSC); *African Insurance Development Corporation v Nigeria Liquified Natural Gas Ltd* (2000) 4 NWLR 494, 505 (Ayoola JSC).

[125] *LAC v AAN Ltd* (2006) 2 NWLR 49.

[126] The other issue was whether a stay of proceedings could be granted if the arbitration clause was capable of being enforced.

[127] This was the eventual decision of the court, but the reasoning of the court, particularly the lead judgment of Garba JCA, was equivocal on this issue.

[128] *LAC v AAN Ltd* (2006) 2 NWLR 49, 80 (Ogunbiyi JCA, as she then was).

> law is that an arbitration clause in agreements generally does not oust the jurisdiction of court or prevent the parties from having recourse to the court in respect of dispute arising therefrom. A party to an agreement with an arbitration clause has the option to either submit to arbitration or to have the dispute decided by the court. The choice of arbitration does not bar resort to the Court to obtain security for the eventual award … But *assuming* that the arbitration clause in the agreement between the parties in this appeal seeks to oust the jurisdiction of the court, then it further supports the ruling of the lower court that the lease agreement comes within the purview of Section 20 and is therefore null and void (emphasis added).[129]

In concluding this aspect of the judgment, Garba JCA contradicted himself by stating the following:

> The real and combined effect of Articles 7 and 8[130] of the aircraft lease agreement entered by the parties to this appeal was and remains to oust the jurisdiction of the lower court in respect of disputes arising from the said agreement. These articles were the grounds upon which the appellant objected to the jurisdiction of the lower court to entertain the suit in its preliminary objection; thus, clearly manifesting that intention and effect. To that extent, I agree with the decision of the lower court that the agreement comes within the contemplation of provisions of Section 20 of the Admiralty Jurisdiction Decree 1991 which renders it null and void.[131]

Fortunately, the Court of Appeal recently reverted to applying the right principle in *Transocean Shipping Ventures Private Ltd v MT Sea Sterling*,[132] when it held (Ogakwu JCA) that:

> The law seems to be ensconced that an arbitration clause does not oust the jurisdiction of a Court. In Obembe vs. Wemabod Estate (1977) LPELR (2161), the apex Court held that any agreement to submit a dispute to arbitration does not oust the jurisdiction of the Court. Equally in Messrs NV Scheep vs. MV 'S. Araz' (2000) 12 SC (Pt 1) 164 at 213, the Supreme Court held that an arbitration clause does not seek to oust the jurisdiction of a Court as all it does is to allow the parties the avenue and possibilities of settling disputes amicably out of Court. In Celtel Nigeria B.V. vs. Econet Wireless Ltd (2014) LPELR (22430) 1 at 58 this Court per Ikyegh, JCA held as follows: 'Arbitration does not remove the jurisdiction of the regular Courts. It is only a stop-gap process to settle the disputes. See Magbagbeola v. Sanni (2002) 4 NWLR (pt. 756) 193 at 205 following Confidence Insurance Ltd v. Trustees of the Ondo State College of Education (1999) 2 NWLR (pt. 591) 373 at 386. It follows that a dispute referred to arbitration merely has the effect of staying proceedings in the regular Court in respect of a pending suit over the same subject matter.' See also Mobil Producing Nig Unltd vs. Suffolk Petroleum Services Ltd (2017) LPELR (41734) 1 at 33–35 and Eaglewood Integrated Resources Ltd vs. Orleans Investment Holdings Ltd (2017) LPELR (43542) 1

[129] *LAC v AAN Ltd* (2006) 2 NWLR 49, 73.

[130] Reference to Clause 8 in the context of the choice of an arbitration forum may have been in error. Clause 8 was phrased under the heading 'Choice of Residence' which provides that 'For any usual notification: the parties have chosen residence as their respective head offices as mentioned in the preamble to the present agreement'.

[131] *LAC v AAN Ltd* (2006) 2 NWLR 49, 74.

[132] (2018) LPELR-45108 (CA).

> at 19–20. In the light of the legal position that an arbitration clause does not oust the jurisdiction of a Court, the provisions of Section 20 of the Admiralty Jurisdiction Act, which renders null and void an agreement that seeks to oust the jurisdiction of the Court, does not come into play in this matter.[133]

C. Statutory Limitations on the Enforcement of a Foreign Arbitration Clause

In relation to foreign jurisdiction clauses, the AJA, the Civil Aviation Act, and the Hamburg Rules have been discussed in this chapter as limiting the effect of foreign jurisdiction clauses (see Section II.A.(iv) above). A similar position applies to foreign arbitration clauses.

Article 20 of the AJA has been criticised in this chapter as a poorly drafted provision of the law. Section 20 of the AJA *appears* to conflict with Sections 4 and 5 of the ACA insofar as it declares an arbitration clause to be null and void in matters pertaining to the Sections 1–3 of the AJA. In *MV Panormos Bay v Olam (Nig) Plc*,[134] Galadima JCA, in an attempt to reconcile this conflict, held that the intention of the legislature under Section 20 was to solely enforce domestic arbitration clauses so that international arbitration clauses are null and void under Section 20 of the AJA.[135] Respectfully, this decision is open to objection on three main grounds. First, the categorisation of arbitration agreements as ouster clauses is inconsistent with the decisions of the Supreme Court. Second, there is no provision contained in Section 20 of the AJA, or any other section, that suggests a distinction in the enforcement of domestic and foreign arbitration agreements. Thirdly, the ACA, which gives effect to Article II(3) of New York Convention on arbitration (an international treaty), is one that is superior to the AJA in the event of any conflict as 'it is presumed that the legislature does not intend to breach an international obligation'.[136]

Fortunately, the Court of Appeal recently reverted to the right principle by holding for the purposes of Article 20 of the AJA, that an arbitration agreement is not an ouster clause.[137] In the final analysis, it explicitly held that its decision in *MV Panormos Bay* was wrongly decided on the basis that it was contrary to existing Supreme Court decisions which hold that an arbitration clause is not an ouster clause.[138]

With the coming into force of the Hamburg Rules (which is an international treaty ratified by Nigeria), the Nigerian court should also hold that where any

[133] *Transocean Shipping Ventures Private Ltd v MT Sea Sterling* (2018) LPELR-45108(CA) 23–25.
[134] (2004) 5 NWLR 1, 13–14.
[135] *MV Panormos Bay v Olam (Nig) Plc* (2004) 5 NWLR 1, 13–14.
[136] *Gani Fawehinmi v Abacha* (2000) 6 NWLR (Pt. 660) 228, 289.
[137] *Transocean Shipping Ventures Private Ltd v MT Sea Sterling* (2018) LPELR-45108 (CA) 23–25 (Ogakwu JCA).
[138] ibid, 35–36 (Ogakwu JCA).

potential inconsistency arises between Article 20 of the AJA and Article 22 of the Hamburg Rules, the Hamburg Rules prevail. Article 22 clearly provides for the mandatory fora in which the claimant has the option to institute an action, in relation to arbitration clauses. They are stated as follows:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
(b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
(c) the port of loading or the port of discharge; or
(d) any additional place designated for that purpose in the contract of carriage by sea.

The parties cannot validly contract out of the above specified options in relation to foreign arbitration clauses except if the agreement was entered into after a dispute arises.[139]

Another clear provision of Nigerian law on mandatory jurisdiction is contained in Article 34 of the Montreal Convention, which provides that in relation to arbitration clauses, an action for damages must be brought at the option of the plaintiff within the territory of one of the High Contracting Parties, either before the tribunal having jurisdiction where the carrier is domiciled, where he has his principal place of business, where he has a place of business through which the contract was made, or before the tribunal having jurisdiction at the place of destination.[140] The use of the word 'must' is mandatory. In other words, a court is bound to refuse the enforcement of a foreign arbitration clause where it does not comply with Article 34 of the Montreal Convention; the Nigerian court has no discretion in the matter.

D. Third Parties to Arbitration Agreements

Only parties to an arbitration agreement have rights and obligations under the agreement. Thus, the Supreme Court in *African Insurance Development Corporation v Nigerian Liquefied Natural Gas Ltd*[141] rightly interpreted Section 5 of the ACA to the effect that an applicant for stay of proceedings must be a 'party to the arbitration agreement.' In that case, the plaintiff entered into a contract with a contractor for the drilling of a water well at Bonny Island, River State. The contract

[139] Article 22(6). However, under Article 22(2), a Contracting State may assume jurisdiction where a vessel is arrested within its jurisdiction, but the defendant may apply to the court that the plaintiff should move its case to one of the specified venues above, subject to providing security for costs in anticipation of a potential judgment that would be awarded in the plaintiff's favour.

[140] This is quite similar to Article 28 of the Warsaw Convention except that the Warsaw Convention makes no provision for arbitration, and one of the connecting factors used in determining the jurisdiction to sue the carrier is actually its ordinary residence rather than its domicile as used in the Montreal Convention.

[141] (2002) 4 NWLR 494.

contained an arbitration clause. The defendant was not a party to this agreement. Subsequently, the contractor and the defendant (as guarantor) entered into a performance bond to pay the respondent the sum of ₦538,122.00 in the event of default by the contractor. The plaintiff terminated the services of the contractor for failure to perform the contract in due time and sued the defendant (as guarantor) on the bond. The defendant applied for a stay of the action pending reference to arbitration, based on the arbitration clause in the agreement. The trial court held in favour of the defendant on the basis that although the arbitration clause was not included in the performance bond, it ought to be read into it, since it was brought into existence by the main contract between the plaintiff and the contractor.[142] The plaintiff appealed, and the Court of Appeal allowed the appeal and reversed the trial court's decision. The defendant appealed to the Supreme Court, which held that it could not stay proceedings under Section 5 of the ACA since the principle of privity of contract precluded the defendant from relying on an arbitration clause it was not a party to.[143]

Another interesting issue is whether privity of contract should apply where the status of the parties changes under the agreement. If a party who is a director is party to an agreement containing a forum selection clause ceases to become a director of a company when a dispute arises with the other directors of the same company who are parties to the agreement, is the party who has ceased to become a director still bound by the arbitration agreement? Although this particular issue was engaged in *Frank v Abdu*, Omage JCA[144] refrained from making any comment on it, as it was not directly raised by the parties in the case at the trial court. It is submitted that, on grounds of legal certainty, the party should still be regarded as a person bound by the arbitration clause contained in the agreement even though his or her status changes. If the contrary were the case, a party that no longer wants to be bound by a forum selection clause in an agreement would simply change his or her status, thereby frustrating the commercial effectiveness of the forum selection clause.

It is submitted that if the law on privity of contract applies to forum selection clauses, then the exceptions to the law on privity of contract should also apply with equal force to forum selection clauses, such as enforcing a foreign arbitration clause against a third party *if* that party is an agent of any of the parties to

[142] It is quite possible the trial judge may have been engaging the principle of accessory allocation or the doctrine of infection by using the jurisdiction clause governing the main contract to govern the performance bond. Although this principle has only been applied in other jurisdictions in the context of choice of law, it would be interesting to explore its application in the choice of jurisdiction context. See generally CSA Okoli, 'The Significance of the Doctrine of Accessory Allocation as a Connecting Factor under Article 4 of Rome I Regulation' (2013) 9 *Journal of Private International Law* 449.

[143] *African Insurance Development Corporation v Nigerian Liquefied Natural Gas Ltd* (2000) 4 NWLR 494, 504–6 (Ayoola JSC), 506 (Belgore JSC, as he then was), 506 (Kutgi JSC, as he then was), Ejiwunmi JSC), 506–7 (Kastina-Alu JSC, as he then was). See also *Gamji Fertilizer Co Ltd v France APPRO SAS; Chevron (Nig) Ltd v Brittania-U (Nig) Ltd* (2018) LPELR-43899 (CA); *Dangote Farms Ltd v Plexux Cotton Ltd* (2018) LPELR-46581 (CA).

[144] (2012) LPELR-12178, 1, 37–38.

the contract.[145] The Supreme Court's decision in *Niger Progress Ltd v NEL Corp*[146] appears to support this view, although the decision reached on the facts of the case was different.[147]

E. Severability

Section 12(2) of the ACA provides that an arbitration clause which forms part of a contract shall be treated as independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not affect the validity of the arbitration clause. Section 12(1) of the ACA also empowers the arbitral tribunal to determine its own jurisdiction to resolve a dispute. In *Nigerian National Petroleum Corporation v CLIFCO Nigeria Ltd*,[148] Fabiyi JSC held that: 'Generally, in arbitration agreements, where the arbitration clause is a part, the arbitration clause is regarded as separate. So where there is novation, purpose of contract may fail but the arbitration clause survives.'[149]

It is submitted, on this basis, that the observations of the Supreme Court in *Niger Progress Ltd v NEL Corp*[150] are open to question. The Court refused to stay proceedings on the ground that, even assuming the defendant was a party to the arbitration clause, that would not have been enough to enforce the arbitration clause because the defendant had not fulfilled the condition for bringing the contract containing the arbitration clause into force, namely the requirement to

[145] *Dunlop Pneumatic & Company Ltd v Selfridge & Co Ltd* [1914] All ER 333. See also CSA Okoli, 'English Courts address the Potential Convergence between the Doctrines of Piercing the corporate veil, Party Autonomy in Jurisdiction Agreements and Privity of Contract' (2014) 3 *Journal of Business Law* 252.

[146] (1983) 3 NWLR 68.

[147] In that case, there was a contract agreement between a Yugoslav company and the plaintiff/respondent for the supply of vehicles. Article 7 of the parties' agreement provided that any dispute that may arise from the parties' agreement should be referred to arbitration, either in Nigeria or Yugoslavia. The claim of the plaintiff/respondent against the defendant/appellant was for the sum of ₦620,000 for money had and received, representing 15% of the total contract value of vehicles to be supplied by the Yugoslav company. The defendant/appellant failed to remit the said money to the Yugoslav company, and as a result, the vehicles were not supplied by the Yugoslav company. Upon being sued, the defendant raised a preliminary objection to the jurisdiction of the court requesting that the proceedings be stayed under s 5 of the ACA and referred to arbitration. The High Court held that although the defendant/appellant was not a party to the agreement, it was reasonable to infer that it was the agent for the Yugoslav company. The plaintiff appealed and the Court of Appeal, in allowing the appeal, held in this regard that the defendant was not a party to the agreement. The defendant appealed to the Supreme Court which held that the defendant was not a party to the agreement and could not rely on the arbitration clause because, on the facts of this case, it was not an agent for the Yugoslav company as was held by the trial court.

[148] (2011) LPELR-2022 (SC).

[149] *Nigerian National Petroleum Corporation v CLIFCO Nigeria Ltd* (2011) LPELR-2022 (SC) 38. See also *BCC Tropical Nigeria Ltd v Government of Yobe State* (2011) LPELR-9230 (CA); *Stabilini Visinoni Ltd v Mallinson & Partners Ltd* (2014) LPELR-23090 (CA); *The Vessel MV Naval Gent v Associated Commodity Int'l Ltd* (2015) LPELR-25973 (CA).

[150] (1989) 3 NWLR 68.

remit the plaintiff's money to the Yugoslav company. If the Supreme Court had considered Section 12(1) and (2) of the ACA, it would probably have held that it is for the arbitral tribunal, in determining its jurisdiction, to rule on the validity of the parties' agreement.

In *Frank v Abdu*,[151] a better approach was adopted. In that case, the defendant-appellants and plaintiff-respondent formed a foreign construction company for the purpose of undertaking road construction projects in Nigeria. When the foreign construction company (the 'sixth defendant-appellant') was formed, the parties were able to secure a contract for the construction of roads for a significant amount of money. The main dispute that arose between the parties concerned the share of liability of the plaintiff-respondent as a director in the company. The defendants, *inter alia*, prayed the court to stay proceedings under Section 5 of the ACA on the basis of an arbitration clause contained in the agreement they had entered into with the plaintiff-respondent. The plaintiff-respondent, *inter alia*, raised the issue of fraud by the directors as a basis for arguing that the arbitration agreement should not be respected. The High Court refused to stay the proceedings. On appeal, the Court of Appeal overturned the refusal. Although neither the concept of severability nor Section 12 of the ACA was expressly mentioned, Omage JCA, in his concurring judgment, rightly held that the allegation of fraud against the defendant directors should not prevent a dispute from being referred to arbitration.[152]

Under the Hamburg Rules, where the parties enter into a contract which violates the Hamburg Rules, the entry into a foreign arbitration clause (at least after the dispute arises) to resolve the matter before the arbitral tribunal would not nullify the agreement for violating the any of the provisions of the Hamburg Rules.[153]

F. Interim Measures in the Protection of a Foreign Arbitration Agreement

Section 13 of the ACA provides that except when the parties otherwise provide in their agreement, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary, and require any party to provide appropriate security in connection with any measure taken. The ACA does not define the interim measures the arbitral tribunal could take. It is submitted that it could include the award of damages against a party who breaches an arbitration agreement, or the issue of an injunction against a party in breach of an arbitration agreement, preventing them from instituting proceedings in another forum.

[151] (2012) LPELR-12178, 1.
[152] *Frank v Abdu* (2012) LPELR-12178, 1, 36–37.
[153] Article 23(1) of the Hamburg Rules.

It is, however, unclear to what extent the Nigerian court can support arbitral proceedings under Section 13 of the ACA, since arbitral tribunals under the ACA are not conferred with powers to sanction disobedience of their orders. For example, can the Nigerian court enforce an order of injunction by the arbitral tribunal against a party who institutes proceedings abroad? Can the Nigerian court enforce security for costs awarded by a foreign arbitral tribunal where the claimant does not bring its case on the merits?[154] It could be argued that the court can enforce such interim measures pursuant to Section 13 of the ACA. Indeed, Sections 51 and 52 of the ACA, which provide conditions for the recognition and enforcement of an arbitral award, do not exclude interim measures from its scope. There is a need to clarify the extent to which Nigerian courts may provide remedies in support of arbitral proceedings,[155] with a view to ensuring that such support would not amount to judicial interference with the arbitral proceedings.

IV. *Forum Non Conveniens*

Forum non conveniens refers to the power of the Nigerian court to stay proceedings in favour of another court on the basis that it is just and more appropriate for the other court to resolve the dispute. There are at least four prominent situations where the concept of *forum non conveniens* could be engaged in Nigerian courts. First, in the context of international litigation, a court, after satisfying itself that any of the conditions under the High Court or Federal High Court Civil Procedure Rules for ordering service of a writ out of jurisdiction are met, and before assuming jurisdiction to grant leave to serve a foreign defendant, may consider whether it is just and appropriate to bring the foreign defendant before its jurisdiction.[156] Second, a defendant who is either resident or non-resident within the court's jurisdiction may be served with the court's processes, but may pray the court to reconsider the decision it made at the *ex parte* stage to assume jurisdiction because there is another forum where the dispute between the parties could be more justly and appropriately resolved.[157] Third, there may be a jurisdiction clause the parties entered into in favour of another court, which the defendant relies upon and prays to stay the proceedings; but the plaintiff could answer by stating that the Nigerian

[154] *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105.

[155] *Cf* Sections 42 to 45 of the Arbitration Act 1996 of the United Kingdom which clearly and expressly recognises the powers of courts in the UK to enforce interim measures of an arbitral tribunal.

[156] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 20–21 (Ayoola JSC). See also *Dalhatu v Turaki* (2003) FWLR (Pt. 174) 247, 265.

[157] *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 20–21 (Ayoola JSC). See also *Federal Mortgage Bank of Nigeria v Olloh* (2002) FWLR (Pt. 107) 1244. This usually occurs because, at the *ex parte* stage, not all materials have been placed before the court upon which it can make a just and final decision as to whether it should exercise jurisdiction over a foreign defendant.

court is more just and appropriate to resolve the dispute. Fourth, there may be similar proceedings between the same parties already pending in a foreign court, and the defendant before the Nigerian court could pray to the court that it is more just and convenient for the foreign court to resolve the dispute.[158]

The concept of *forum non conveniens* could be engaged either in inter-State or international litigation, though it appears more significant at international litigation.[159] This section examines three main issues, namely the correct legal principle or basis for utilising the concept of *forum non conveniens*; the factors the court may take into account in deciding whether it should exercise jurisdiction or decline jurisdiction in favour of another forum; and the weight courts should give to *lis alibi pendens* in their *forum non conveniens* analysis.

A. Choice of Venue, Judicial Division, and *Forum Non Conveniens*

In Chapter five of this book, it was submitted that some Nigerian appellate courts wrongly use choice of venue rules to resolve jurisdiction *in personam*, so that even where a defendant resident or present within a jurisdiction submits to the court's jurisdiction, or where the Nigerian court grants the plaintiff leave to serve a defendant that is outside the court's jurisdiction, it may be held, based on choice of venue rules, that the Nigerian court has no jurisdiction to hear the matter. It was also submitted in Chapter five that decisions which have held, particularly in the context of inter-State litigation, that a State High Court has no jurisdiction to resolve a matter which occurs outside its territorial jurisdiction, are erroneous. In both scenarios discussed in Chapter five, one of the reasons why the courts erred was because they did not appreciate the application of the private international law principle of *forum non conveniens* in the inter-State or international litigation context.

The utilisation of choice of venue rules to resolve matters of private international law in the inter-State or international litigation context often results in a

[158] The concept of *lis alibi pendens* does not necessarily have to be engaged in this situation. For example, the subject matter or the parties in both proceedings could be different, but this may be one of the factors the court takes into account in applying the doctrine of *forum non conveniens.*

[159] The issue of considering *forum non conveniens* could arise in international litigation both in the context of exercising jurisdiction to order service of a court's process outside the court's jurisdiction, or, in a reconsideration of the exercise of jurisdiction, in deciding whether the court processes have been served on the defendant who has appeared before the court. In the context of inter-State litigation, it should only arise when the parties have been served and the court is called upon to consider whether it should exercise jurisdiction. The rationale for this position stems from the submission in Chapter 4 of this volume (criticising Nigerian Courts) that, in inter-State litigation, the provisions of the Sheriffs and Civil Processes Act regulate the issue of service of court processes and there is no need to obtain the leave of court to issue and/or serve court processes outside the court's jurisdiction. Some of the cases referred to in this work fall into that error, but they are also utilised for academic purposes as support for the context of international litigation.

miscarriage of justice in Nigerian courts. The court, in resorting to choice of venue rules, may wrongly deprive itself of its discretion to consider whether it should exercise jurisdiction, thereby unjustly shutting the plaintiff out of the court, or it may wrongly exercise jurisdiction where it should decline jurisdiction in favour of another court, thereby unjustly forcing a defendant that is not resident within the court's jurisdiction to defend the case.

To illustrate this point, in *Arjay Ltd v Airline Management Support Ltd*,[160] the plaintiff-respondent sued the defendant-appellants for breach of contract (arising from an aircraft lease agreement) in the Federal High Court. The plaintiff rightly obtained leave to issue and serve the defendants (being resident and carrying on business in the United Kingdom) outside of the jurisdiction of the court. The Supreme Court wrongly placed reliance on the choice of venue rules of Order 10 rule 1(4) of the Federal High Court (Civil Procedure) Rules, 1999, which provides that

> [a]ll suits for specific performance, or upon the breach of any contract, shall be commenced and determined in the Judicial Division of the court in which the contract is supposed to have been performed or in which the defendant resides or carries on substantial part of his business.

The court held that the Federal High Court had no jurisdiction because the place of performance was in Equatorial Guinea, the contract was entered into in the United Kingdom, and the defendants also resided in the United Kingdom.

If the principle of *forum non conveniens* had been correctly engaged in this case, the Court, in exercising its discretion, would have focused on whether it was just and convenient for it to decline its jurisdiction in favour of the English courts or the courts in Equatorial Guinea. The Supreme Court would not have confined itself to the connecting factors of the place of performance, the residence of the parties, and the place where the contract was entered into as provided in the choice of venue rules. In addition, the Supreme Court would probably have held in favour of the plaintiff based on the facts in this case. This is because the plaintiff was resident and carrying on business within Nigeria, would ultimately have the aircraft delivered to it in Nigeria, had obtained security for damages against the assets of the defendant (aircraft) at the Federal High Court to satisfy a potential judgment sum in Nigeria, and there were other connections to Equatorial Guinea and the United Kingdom so that it was not clear which of these two fora was more just and appropriate to resolve the dispute when compared to the Nigerian forum.[161]

In the same vein, where the court bases its decision on choice of venue rules to resolve a matter of *forum non conveniens* in Nigerian private international law, we may also have a situation where the only factor that connects the dispute to Nigeria is the fact that, for example, a contract was made within the jurisdiction

[160] (2003) 7 NWLR (Pt. 820) 577.

[161] For example, in *Herb v Devimco* (2001) 52 WRN 19, 39–40, Sanusi JCA, in considering the subject of *forum non conveniens*, *obiter*, rightly held that the residence of defendants in different countries is a significant factor that the Nigerian court could take into account in refusing to decline jurisdiction.

of the Nigerian court,[162] whereas there may be other significant reasons (such as the choice of law, place of performance, residence of the parties, availability of the evidence and witnesses, costs and convenience, and assets within a jurisdiction) why the Nigerian court should decline jurisdiction in favour of another court. This would otherwise result in injustice to the detriment of the defendant, who would be adversely affected by defending a suit that has no real connection to Nigeria.

B. Factors to Consider in *Forum Non Conveniens* Cases

The plea of *forum non conveniens* 'can never be sustained unless the court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably for the interest of all the parties and the ends of justice'.[163] In utilising the concept of *forum non conveniens*, a Nigerian court balances two important considerations. On the one hand, as part of a sovereign state, a Nigerian court is not quick to decline exercising jurisdiction which it has by Nigerian law, and thereby unjustly shut out the plaintiff from accessing the Nigerian court.[164] On the other hand, the Nigerian court, on the grounds of comity and the interest of justice, is wary of bringing a foreign defendant before its jurisdiction in a matter where the plaintiff does not have a reasonable cause of action against the defendant,[165] or where the Nigerian court does not have a significant connection with the dispute, despite the fact that the plaintiff's case discloses a reasonable cause of action.[166]

In this regard, a Nigerian court is not swayed by patriotic sentiments in order to exercise jurisdiction over a foreign defendant just because one of the parties is of Nigerian nationality.[167] On the contrary, a Nigerian court, in deciding whether

[162] In view of modern technological advancements, the place where a contract was entered into may only be fortuitous, and parties could negotiate and conclude a contract from more than one jurisdiction. See also *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50; *Apple Corps Ltd v Apple Computers Incorporated* [2004] 2 CLC 720.

[163] *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR 434, 454 (Pats-Acholonu JSC).

[164] *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 20–21. *Cf Basoroum v Clemessy International* (1999) 12 NWLR 516, 526 (Pats-Acholonu JCA as he then was).

[165] Although a consideration of a 'reasonable cause of action' is likely to be addressed on the merits of the case, there is no good reason why the court cannot address it at the interlocutory stage if it *sufficiently appears* to the court that the claimant is *very unlikely* to succeed before the Nigerian court if the case is heard on the merits. There is no good reason why the Nigerian court should exercise jurisdiction to resolve a claim that is manifestly frivolous. English courts also adopt a similar approach in utilising what is known as the 'good arguable case' ('one side has a much better argument on the material available'). *Canada Trust Company v Stolzenberg (No 2)* [1998] 1 WLR 547; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.

[166] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11, 20–21 (Ayoola JSC); *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR 434, 454 (Pats-Acholonu JSC). *Cf Basoroum v Clemessy International* (1999) 12 NWLR 516, 526 (Pats-Acholonu JCA as he then was).

[167] *Basoroum v Clemessy International* (1999) 12 NWLR 516, 526 (Pats-Acholonu JCA as he then was).

or not to exercise its discretion, is objectively, impartially, and primarily concerned with the interests of the parties and the ends of justice, and with which jurisdiction the dispute has a real or substantial connection.[168]

It has been held that in exercising their discretion, a judge must take into account all the circumstances of the case.[169] Thus, a judge should not ordinarily regard any factor as singly decisive in determining whether to exercise jurisdiction.[170] The exercise of discretion involves a cumulative weighing of connecting factors (but not a numerical or mechanical counting of connecting factors) by the judge on whether the Nigerian court should exercise jurisdiction, or whether it is more just and appropriate to decline jurisdiction in favour of a foreign court, based on the circumstances of each case.

However, in embarking on this weighing exercise, the Nigerian court generally gives more significance to factors that have real and practical significance in its decision of whether or not to exercise jurisdiction. A choice of law agreement in favour of a particular forum could be very significant because it would be presumed that the court is in the best position to apply the law of its forum;[171] the residence of all (or a large number) the parties and witnesses within the court's jurisdiction could be a strong indication that it is just and appropriate for that court to exercise jurisdiction;[172] the presence of assets within a court's jurisdiction could be very significant where it is established that the defendant does not have assets in the location of the foreign court to satisfy the judgment sum, and that the Nigerian court does not have any reciprocal arrangement with the foreign court to enforce the judgment in Nigeria;[173] in contractual obligations, the place of performance could be very important because of its commercial significance in resolving

[168] See also *Herb v Devimco* (2001) 52 WRN 19, 39–40 (Sanusi JCA); *Broad Bank of Nigeria Ltd v Olayiwola & Sons Ltd* (2005) 3 NWLR 434, 454 (Pats-Acholonu JSC).

[169] *Herb v Devimco* (2001) 52 WRN 19, 39 (Sanusi JCA).

[170] For example, the Court of Appeal in *Nahman v Allan Wolowicz* (1993) 3 NWLR 443 was wrong to have regarded the currency of payment as decisive in giving the Nigerian court jurisdiction. In that case, the plaintiff sued the first and second defendants jointly and severally in respect of a loan (for the sum of 342,000 Naira) it had availed them in 1985, while all the parties were resident in England. The plaintiff obtained the leave of the Nigerian court to serve the defendants outside the court's jurisdiction in England. The defendants challenged the court's jurisdiction on the basis that the loan arrangement was made in England and not Nigeria and thus, the Nigerian court did not have jurisdiction. The High Court and Court of Appeal both dismissed the case of the defendant. The Court of Appeal, in a unanimous decision, rightly held that the Nigerian court and the English court had concurrent jurisdiction on the matter, but wrongly held that this was because the payment was to be made in Naira (giving the Nigerian court jurisdiction) and the loan transaction was made in England (giving the English court jurisdiction). Other problems with the judgment include the reliance on choice of venue rules, and the failure to appreciate the distinction between *existence* and *exercise* of a court's jurisdiction.

[171] *Basoroum v Clemessy International* (1999) 12 NWLR 516, 526 (Pats-Acholonu JCA as he then was) approving Brandon J's statement in *The Eleftheria* [1970] 1 Lloyd's Rep 237. See also *Resolution Trust Corp v FOB Investment & Property Ltd* (2000) 6 NWLR 246, 260 (Chukwuma-Eneh JCA).

[172] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97, 121–22. See also *Resolution Trust Corp v FOB Investment & Property Ltd* (2000) 6 NWLR 246, 260 (Chukwuma-Eneh JCA).

[173] *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97, 121–22. *Cf Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR 577.

the case, just as the place of injury or damage in non-contractual obligations would be of immense significance in resolving a dispute.

On the other hand, the language of the contract should not ordinarily be given considerable significance, as a contract drafted in English does not indicate that the English courts have a closer connection with the dispute,[174] nor does a contract drafted in French indicate that the French courts, or the courts of any other francophone country, have a closer connection with the dispute, when the services of interpreters can be utilised in Nigerian courts[175] The currency of payment specified in a contractual or non-contractual claim should not ordinarily be given considerable significance in determining whether or not a Nigerian court should exercise jurisdiction[176] as Nigerian courts are now empowered to give judgments in foreign currency.[177]

In order to better appreciate how the court should weigh the factors in exercising its discretion on whether to exercise jurisdiction in the case, we examine four scenarios which, in our opinion, the Nigerian court rightly exercised jurisdiction; wrongly exercised jurisdiction; rightly declined jurisdiction; and, wrongly declined jurisdiction.

Cold Containers (Nig) Ltd v Collis Cold Containers Ltd ('*Cold Containers*')[178] is an example of the court rightly exercising jurisdiction. In *Cold Containers*, the plaintiff, a company resident in Nigeria, and the defendant, a company resident in England, entered into a contract whereby it was alleged that the plaintiff was to act as the defendant's agent for the sale and delivery of vehicles to buyers in Nigeria in consideration of a 25 per cent commission. There was subsequently a dispute between the parties, upon which the plaintiff, at the *ex parte* stage, sought the leave of the State High Court, Lagos to serve the defendant outside the court's jurisdiction in England. The State High Court, having satisfied itself that one of the conditions for service outside the court's jurisdiction was met, as the contract was made within jurisdiction of the court,[179] considered whether it was *forum conveniens* to resolve the matter. In reaching its decision, it considered the following factors, none of which were regarded as decisive: the location of the witnesses in Nigeria and England; the assets of the proposed defendant in Nigeria; whether any judgment obtained against the defendant would be enforceable against it in

[174] See, for example, the position in England where the use of English in drafting a contract is usually given little significance as a connecting factor because it is common knowledge that English is the language of international commerce: *Samcrete Egypt Engineers v Land Rover Exports Ltd* [2001] EWCA 2019, [38].

[175] *Cf Basoroum v Clemessy International* (1999) 12 NWLR 516.

[176] *Cf Nahman v Allan Wolowicz* (1993) 3 NWLR 443, 455 (Kalgo JCA, as he then was), 459 (Tobi JCA, as he then was).

[177] See generally *Koya v United Bank for Africa* (1977) 1 NWLR 251, 276–89; *Saeby Jernstoberi & Maskinfabrik v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 196–97. In the past this was not the case – see *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* (1971) 2 NCLR 121, 135.

[178] (1977) NCLR 97.

[179] High Court of Lagos State (Civil Procedure) Rules 1973, Ord 7 r 1(e).

England; the fact that substantial parts of the contract had to be performed in Nigeria; and that the parties must have contemplated that if there was a breach, proceedings would be issued in Nigeria. Balogun J rightly concluded the following:

> It seems to me that it would not be a proper exercise of my discretion if I were to ignore all these considerations on this point and were to refuse to exercise jurisdiction merely on the ground that some of the witnesses of the proposed defendant would (as I believe) come from Nigeria. In my view the proposed plaintiff has made it sufficiently to appear to the court, that as between the Nigerian courts and the English courts, the Nigerian courts (and indeed the courts in Lagos State) are the *forum conveniens.*[180]

With regard to the second and third scenarios, the Court of Appeal, in the case of *Resolution Trust Corp v FOB Investment & Property Ltd*,[181] rightly interfered with the decision of the trial judge who wrongly exercised jurisdiction in a case that would have been more just and appropriate for a US court to resolve. In this case, the first defendant had approached the plaintiff in Nigeria to invest in shares in a banking institution in the United States. Subsequently, the same banking institution went bankrupt. The second defendant was appointed as a receiver to liquidate the bank's assets. The plaintiff's claim against the second defendant was that the plaintiff was not given powers of acquisition over the bank. The defendants, upon receipt of the plaintiff's processes, entered a conditional appearance and prayed that the court decline jurisdiction on the basis of *forum non conveniens*. The High Court dismissed the prayer of the defendants. On appeal, however, the defendants were successful. Although the Court of Appeal, in its reasoning, fell into the error of muddling choice of venue rules with the concept of *forum non conveniens*, the Court of Appeal rightly considered the following factors in reaching the conclusion that a US court was more just and appropriate to resolve the dispute: all the defendants were domiciled in the United States; the business of the second defendant-appellant was carried out in United States and had little or no connection to Nigeria or presence in Nigeria; The Central Saving Bank was located in the State of New York and had no branches, operations or contacts with Nigeria; the investment which the plaintiff alleged it would make was in the United States; the alleged breach for which the plaintiff was suing occurred in the United States; the law governing the affairs of the parties was the Financial Instruction Reform Recovery and Enforcement Act 1989 (FIRREA), a statute of the United States Congress; and, the documents necessary to resolve the dispute were located in the United States.[182]

Basoroum v Clemessy International[183] is an example of a case in which the court wrongly declined jurisdiction. The plaintiff-appellant sued the defendant-respondent French companies for breach of a contract to the effect that the

[180] (1977) NCLR 97, 122.
[181] (2001) 6 NWLR (Pt. 708) 246.
[182] *Resolution Trust Corp v FOB Investment & Property Ltd* (2001) 6 NWLR (Pt. 708) 246, 263 (Chukwuma-Eneh, JCA, as he then was).
[183] (1999) 12 NWLR 516.

plaintiff-appellant would be entitled to a five per cent commission from the payment of all jobs executed in Nigeria. The plaintiff-appellant successfully got an interim injunction from the Lagos State High Court restraining the defendant-respondents or their agents from withdrawing any money from the Central Bank of Nigeria. The defendant-respondents, upon receipt of the processes, filed an application that the Court should decline jurisdiction on the basis that the contract was neither entered into nor performed within the jurisdiction of Nigeria, the language of the contract was in French, and payment was to be made in Switzerland. The Lagos High Court accepted these arguments and declined jurisdiction. The Court of Appeal, in a unanimous decision, upheld this ruling. Pats-Acholonu JCA (as he then was) made the following pronouncements:

> A careful perusal of these averments does not show where the contract was entered. As the court below observed all the correspondents [*sic*] are in French. The English translation was made by some academic don brought to the court it would seem. The money – the fee is collectible in Switzerland. It is not known where the contract was made as not much was given in the statement of claim but the much that is stated does not exactly say that the contract is entered here to be performed here.[184]

It is submitted with due respect that the above reasoning of the Court of Appeal is flawed for two main reasons.[185] First, the contract is one which should have been regarded as made within the jurisdiction of the Court in order for the Court to establish its powers to assume jurisdiction under the then Order 8 Rule 1(e) of the Lagos State (Civil Procedure) Rules 1994. This is because the law is that where it is unclear where a contract is made between a creditor and a debtor, the contract is deemed to have been made at the creditor's residence on the basis that it is for the debtor to pursue the creditor and pay the creditor at its residence.[186] Because the creditor was the plaintiff in this case, the contract should have been deemed to have been made within the jurisdiction of the Nigerian court.

Second, the Court of Appeal and trial court appear to have given weight to factors that were of no real significance, such as the language of the contract, in determining the appropriate and just forum to exercise jurisdiction over the case. The Court of Appeal overlooked the significance of factors pointing to the Nigerian forum (as being just and appropriate to resolve the dispute between the parties), such as: the fact that the contract was to be performed in Nigeria in order for the plaintiff to derive its five per cent commission (an inference that could easily be made from the first paragraph of the plaintiff's statement of claim); the defendant

[184] *Basoroum v Clemessy International* (1999) 12 NWLR 516, 528.

[185] The Court of Appeal also wrongly utilised choice of venue rules and failed to appreciate the distinction between the *existence* and the *exercise* of a court's jurisdiction.

[186] See *Blaize v Dove* (1936) 13 NLR 66; *Benworth Finance Ltd v Ibrahim* 1969 (3) ALR Comm 180; *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 577; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172, 190–91; *Eastern Bulkcem Co Ltd v MOS Amobi* (2010) 4 NWLR (Pt. 1184) 381, 402.

had assets in the Central Bank of Nigeria that could satisfy a potential judgment sum; and that it would be unjust to force the plaintiff to sue in a Swiss court which has no reciprocal arrangement with Nigeria on the enforcement of foreign judgments in the event that the plaintiff sues in Switzerland and obtains judgment there.[187] In a nutshell, the manner in which the High Court and Court of Appeal exercised their discretion in this matter was unprincipled, and is a clear example of the type of decision the Supreme Court should interfere with and overturn.

From the foregoing, it is submitted that Nigerian courts, as part of a sovereign country, should not decline jurisdiction in favour of a foreign court, except when the defendant clearly establishes that there is another forum to whose jurisdiction the plaintiff is amenable, where justice can be done between the parties without depriving the plaintiff of a legitimate personal or juridical advantage that would be available to the plaintiff had it invoked the jurisdiction of the Nigerian court.[188]

C. *Lis Alibi Pendens*

Lis alibi pendens arises where proceedings instituted in the Nigerian court between the same parties and regarding the same subject matter are already pending in another forum. This requirement is conjunctive, so that *lis alibi pendens* is inapplicable where either the parties or the subject matter involved in the 'parallel' proceedings are not the same.[189] In *Jammal v Abdalla Hashem*,[190] the plaintiff brought an action against the defendant to recover the money it had paid to the defendant for the purchase of shares in the defendant's company, which the defendant allegedly failed to deliver. The defendant's case was that the money paid by the plaintiff was the price of promissory notes which the plaintiff had bought from a third party through the defendant. The defendant prayed the court to stay the action on the ground that the plaintiff had brought a similar action on the promissory notes against the promisor as a defendant in a pending foreign court proceeding (*Tribunal du Commerce d'Anvers*, in Antwerp, Belgium). The court, in dismissing the defendant's application and refusing a stay, held that on the evidence,

> the defendant was sued in Nigeria while an entirely different person was sued in another country, Belgium. It would be an uphill task for the defendant to attempt to prove the

[187] See the Reciprocal Enforcement of Judgments Ordinance 1922; Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960.

[188] See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. See also *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97.

[189] *Morgan v WAA and Eng Co Ltd* (1971) 1 NMLR 219: *Jammal v Abdalla Hashem* (1975) NCLR 141; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR 462, 487 (Oduyemi JCA); *Okafor v Attorney-General Anambra State* (1991) 6 NWLR (Pt. 200) 659, 681.

[190] (1975) NCLR 141.

> action pending in this court is vexatious. He is not a party to the Antwerp proceedings, neither has he shown any relationship between him and the party sued in Antwerp.[191]

There are two factors Nigerian judges should counterbalance when confronted with *lis alibi pendens* in an application for a stay of proceedings. On the one hand, the Nigerian court, which is part of a sovereign state, should not ordinarily deprive a plaintiff of the procedural advantage it may derive from instituting proceedings in Nigeria.[192] On the other hand, the existence of parallel proceedings could be oppressive and vexatious to one of the parties or amount to an abuse of the court's process.[193] There is also the danger that the existence of parallel proceedings could result in inconsistent judgments, which could be problematic at the enforcement stage.

Generally, Nigerian courts are more likely to stay an action in respect of a matter which is already pending before another forum, where the parties have entered into a forum selection clause to litigate or arbitrate in that forum, and that forum is also convenient and appropriate to resolve the parties' dispute.[194]

It appears that there is a distinction between the inherent common law powers of the Nigerian court to stay proceedings in cases of international litigation and inter-State litigation. In the case of international litigation, the plaintiff is entitled to institute parallel proceedings abroad and in Nigeria, but a Nigerian court, in the exercise of its discretion, could decline jurisdiction if the defendant establishes that the plaintiff derives no procedural advantage from instituting parallel proceedings rather than confining its claim to one court, or if the plaintiff's parallel suit against the defendant is vexatious, oppressive, or an abuse of the court's process.[195] In inter-State litigation, Nigerian courts regard the institution of parallel proceedings as *prima facie* an abuse of court process.[196] The second State High Court would

[191] *Jammal v Abdalla Hashem* (1975) NCLR 141,148.

[192] ibid, applying *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225 and approving *Cohen v Rothfield* [1919] 1 KB 410; *Ionian Bank Ltd v Couvreur* (1969) 1 WLR 781. For example, the plaintiff who institutes an action in a foreign court against a foreign defendant may discover that the proceedings are too slow in the foreign court compared to suing in Nigeria. The plaintiff may also not want to be caught barred by time in suing in Nigeria. Thus, if the plaintiff also institutes parallel proceedings in Nigeria, he may be able to obtain judgment against the foreign defendant and promptly enforce it in the Nigerian forum if the foreign defendant has assets in Nigeria, or may proceed to enforce it in the foreign forum depending on the applicable private international law rules in the foreign forum.

[193] *Okafor v Attorney-General Anambra State* (1991) 6 NWLR (Pt. 200) 659, 681; *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR 462, 487 (Oduyemi JCA); *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105, 145–47 (Karibi-Whyte JSC); *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR; 469, 490–91 (Iguh JSC).

[194] See generally *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469.

[195] *Jammal v Abdalla Hashem* (1975) NCLR 141 approving *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225; *Cohen v Rothfield* [1919] 1 KB 410; *Ionian Bank Ltd v Couvreur* [1969] 1 WLR 781.

[196] *Oyagbola v Esso WA Inc* (1966) 2 SCNLR 35; *Morgan v West African Automobile and Engineering Co Ltd* (1971) 1 NMLR 219, 221–22; *Okorodudu v Okorodudu* (1977) 3 SC 21; *Kotoye v Saraki* (1992) 9 NWLR (Pt. 264) 156. See also *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR 462. Even where the parties or subject matter are not the same, the Nigerian court, under its inherent powers, could consolidate the proceedings. See also *Alhaji Atiku Abubakar (GCON) v Alhaji Umaru Musa Yar'Adua* (2008) 1 SCNJ 549.

ordinarily assume, though not conclude, that unless the first suit is discontinued, the second State High Court would regard the second action as an abuse of the court's process, and strike out the suit.[197]

Nahman v Allan Wolowicz[198] appears to suggest that a Nigerian court *must* decline jurisdiction where the case is already pending before another court. This is open to question. The facts in *Nahman v Allan Wolowicz*,[199] however, did not require a consideration of *lis alibi pendens*, as there was no proceeding pending before another forum. The Court of Appeal held that the Nigerian and English courts could exercise concurrent jurisdiction in a case relating to a loan transaction made in England, with payment to be made in Nigeria, but reached this decision on the basis that the Nigerian court could exercise this jurisdiction because the suit was *first* instituted in the Nigerian court.[200] In this regard, Tobi JCA (as he then was), in his concurring judgment, also made the following observation:

> A situation may arise, even in municipal jurisprudence where two courts have jurisdiction in a matter. A situation may also arise where two courts in two different countries have jurisdiction in a matter. In any of the above situations the courts are said to have concurrent jurisdiction in the matter.
>
> Where two courts have concurrent jurisdiction in a matter any of them can exercise jurisdiction. But once one of them exercises jurisdiction, the other cannot exercise jurisdiction in the same matter. The jurisdiction of the second court must, as a matter of law or as operation of law, abate. Where however, the second court still arrogates to itself jurisdiction, the action will be liable to the equitable relief of estoppel *per rem judicatam*, if the matter is finally disposed of.[201]

It appears Tobi JCA (as he then was) made the above observation because he wrongly held that the principles of conflict of laws had no application to this case,[202] and approached this case simply from the perspective of public international law and the concept of *res judicata*.[203] The observations of Kalgo JCA (as he then was) and Tobi JCA (as he then was) on the subject of *lis alibi pendens*, which were reached in *obiter*, are inconsistent with a later decision of the Nigerian Court of Appeal in *Ogunsola v All Nigeria People's Party*,[204] in which Oduyemi

[197] *Morgan v West African Automobile and Engineering Co Ltd* (1971) 1 NMLR 219; *Okafor v Attorney-General Anambra State* (1991) 6 NWLR (Pt. 200) 659; *The Vessel 'Saint Roland' v Osinloye* (1997) 4 NWLR (Pt. 500) 387; *Saraki v Kotoye* (1992) 9 NWLR (Pt. 264) 156, 188–89; *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105, 145–47 (Karibi-Whyte JSC); *Ogunsola v All Nigeria Peoples Party* (2003) 9 NWLR 462; *Agwasim v Ojichie* (2004) 10 NWLR (Pt. 882) 613, 622–23; *Unifam Ind Ltd v Oceanic Bank Intl (Nig) Ltd* (2005) 3 NWLR (Pt. 911) 83.

[198] (1993) 3 NWLR 443, 455 (Kalgo JCA), 459 (Tobi JCA).

[199] ibid.

[200] *Nahman v Allan Wolowicz* (1993) 3 NWLR 443, 455 (Kalgo JCA), 459 (Tobi JCA). The other error made in this case was a wrong reference to choice of venue rules and the failure to appreciate the doctrine of *forum non conveniens.*

[201] *Nahman v Allan Wolowicz* (1993) 3 NWLR 443, 459 (Tobi JCA, as he then was).

[202] ibid, 459–60 (Tobi JCA, as he then was).

[203] ibid, 459–60 (Tobi JCA, as he then was).

[204] (2003) 9 NWLR 462.

JCA, while considering the concepts of *forum non conveniens* and *lis alibi pendens*, held that the Nigerian court, *as a matter of discretion*, declines jurisdiction where proceedings are already pending in another court.[205] It is submitted that the latter decision of the Court of Appeal is preferred for the reasons already advanced in *Ogunsola* and *Jammal*. It also accords with the approach taken in other common law countries.

D. Stay of Proceedings Under the Admiralty Jurisdiction Act

Section 10(1) of the AJA provides that:

> Without prejudice to any other policy of the Court,
>
> (a) where it appears to the Court in which a proceeding commenced under this Decree is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country; and
>
> (b) where a ship or other property is under arrest in the proceeding,
>
> the Court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgement that maybe made in the arbitration or in a proceeding in the court of the foreign country[206]

Section 10(1) of the AJA envisages a situation where proceedings are pending before the Nigerian court and the defendant makes a request to the court to stay proceedings on the basis of an arbitration clause (foreign or domestic), foreign jurisdiction clause, or of *forum non conveniens.* The Federal High Court could also dismiss proceedings on grounds of *lis alibi pendens* for abuse of the court's process on the basis that there is a pending action in an arbitral tribunal or a foreign court, and it is just and convenient for the foreign forum to resolve the dispute. The Federal High Court may, as a condition for the stay or dismissal of proceedings, order security for costs from the defendant for the release of a ship or other property for the satisfaction of a judgment or award the plaintiff may get in the foreign forum.

Section 10(2) also gives the court additional powers that are just and reasonable, such as instructions relating to the prosecution of the arbitral proceedings, and provisions for additional security by the defendant in relation to the satisfaction of

[205] *Ogunsola v All Nigeria People's Party* (2003) 9 NWLR 462.

[206] The Court of Appeal in *MV 'Da Qing Shan' v Pan Asiatic Commodities Pte Ltd* (1991) 8 NWLR (Pt. 209) 368 (without reference to s 10 of the AJA) recognised that the Federal High Court, in a matter commenced before it in respect of a substantive claim for damages where its jurisdiction was invoked by ordering the arrest of a ship, the Federal High Court was also empowered to stay proceedings commenced before it for the purpose of having the dispute resolved by arbitration.

an award made in the foreign proceedings.[207] Section 10(3) empowers the court to make interim or supplementary orders to preserve the ship, other property, or the rights of a third party interested in the ship or other property. Section 10(4) then gives the plaintiff the option of enforcing the judgment instituted in the foreign forum in the Federal High Court.

Section 10 of the AJA raises an important issue as to whether admiralty proceedings must be brought on the merits before the Federal High Court, or whether the Federal High Court can also use Section 10 of the AJA to simply grant interim relief or a measure in support of arbitration (domestic or international) or foreign judicial proceedings. The English High Court in *The Jalamatsya*,[208] while interpreting Section 26 of the United Kingdom Civil Jurisdiction and Judgments Act 1982 (the 'UK Act'),[209] which is similar to Section 10 of the AJA, held that Section 26 of the UK Act was also open to the second interpretation.[210] The Nigerian Supreme Court in *NV Scheep v MV 'S Araz'*[211] did not adopt the approach taken by the English Court in *The Jalamatsya*. Although the Supreme Court held that the facts in *The Jalamatsya* were on all fours with the case it was called upon to decide, and held that Section 26 of the UK Act was not *in pari materia* with Section 10 of the AJA, which envisaged a pending claim before the Federal High Court that was brought on the merits of the case.[212] The Supreme Court held in this regard that a plaintiff cannot use Section 10(1)-(2) of the AJA simply for the purposes of arresting a ship or property in the Federal High Court or obtaining security for damages in anticipation of a potential judgment or award that may be

[207] This discretion may be exercised where, for example, the plaintiff could not arrest the ship or other property of the claimant *in rem* because it was not within the court's jurisdiction, but the court, in its discretion, makes an order that the defendant should pay some money to the court as security for staying proceedings in favour of a foreign forum. An order of injunction freezing the assets of the defendant in the Nigerian forum can also fulfil this role.

[208] [1987] 2 Lloyd's Rep 164.

[209] 'Where, in England, Wales, or Northern Ireland, a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom or of an overseas country, the court may, if in those proceedings property has been arrested, or other security has been given to prevent or obtain release from arrest – (a) order that the property arrested be retained as security for the satisfaction of any award of judgment which (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed and (ii) is enforceable in England and Wales, or as the case may be, in Northern Ireland, or (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.'

[210] Section 26 of the UK Act 'was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment S. 26 applied whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security' – Sheen J in *The Jalamatsya* [1987] 2 Lloyd's Rep 164, 165.

[211] (2001) 4 WRN 105.

[212] *NV Scheep v MV 'S Araz'* (2001) 4 WRN 105, 133–6 (Ogundare JSC), 151–52 (Karibi-Whyte JSC), 155–57 (Onu JSC), 158 (Achike JSC), 158 (Kalgo JSC).

reached in proceedings already pending in another forum,[213] but could be utilised for the purpose of enforcing a judgment or award.[214]

The facts of the *NV Scheep v MV 'S Araz'* case are that the second defendant-respondent, by a charter party, hired the vessel from the plaintiff, which was later detained as a result of a dispute between the parties. The detention of the vessel resulted in a claim made by the plaintiff against the second defendant-respondent for demurrage or damages before a London arbitral tribunal. In the arbitral proceedings in London, the defendant failed to comply with the order of the tribunal to provide security for damages in anticipation of a potential award. The plaintiff's agent therefore brought proceedings before the Federal High Court, Lagos division for the arrest and detention of the vessel allegedly belonging to the second defendant called the MV 'S. Araz' within its jurisdiction, and an order that the vessel be released from arrest only upon the defendants-respondents furnishing an acceptable bank guarantee in the sum of US$300,000 to meet the claim of the plaintiff in the London arbitral proceedings. The Federal High Court granted this application. On appeal, the Court of Appeal allowed the appeal and set aside the judgment of the Federal High Court. On further appeal to the Supreme Court, the Supreme Court sustained the decision of the Court of Appeal.

It is submitted that the Supreme Court was right. Section 10 of the AJA has two conditions: there must be an action pending before the Federal High Court in which a stay is requested by the defendant and there must have been an arrest. The provision is really about the need to impose a condition on granting a stay so that the interests of the plaintiff, who had hitherto secured an arrest, are protected. It is not a provision that can be used to arrest ships in the 'abstract'.

The Supreme Court's decision, however, exposes a larger problem. The plaintiff may not be in a position to effectively bring proceedings in breach of an arbitration agreement or foreign jurisdiction clause in the Nigerian court on the merits of the case, because the foreign court may issue an anti-suit injunction in this regard. It is unclear what the remedy is for a claimant who institutes proceedings in a foreign forum and then sues in Nigeria simply to obtain interim relief from the Nigerian court. In respect of foreign arbitral proceedings, it has been argued that the court could enforce the interim relief the arbitral tribunal makes pursuant to Section 13 of the ACA. In respect of foreign judicial proceedings, the position appears more problematic as, under common law, the Nigerian court can only enforce a fixed money judgment that is final; it cannot enforce interim measures such as an injunction. This is an area that requires legislative intervention in Nigeria, in the absence of which it would take a bold and innovative Supreme Court to develop the common law to include the enforcement of interim measures to support foreign judicial proceedings.

[213] ibid, 133–36 (Ogundare JSC), 153 (Karibi-Whyte JSC).
[214] ibid, 133–36 (Ogundare JSC).

V. Conclusion

This chapter discussed the distinct but also related concepts of forum selection clauses, *forum non conveniens*, and *lis alibi pendens*. A forum selection clause could either be a jurisdiction or arbitration clause, but they are conceptually different. Nigerian courts would give effect to a foreign jurisdiction clause unless the party who has brought an action in breach of the clause advances a strong cause to the contrary. The current trend of the Supreme Court is generally to hold parties to their agreement in the enforcement of a foreign jurisdiction clause. There are statutory provisions that limit the effect of a foreign jurisdiction clause. It has been argued that Section 20 of the AJA, which is poorly drafted, should be amended or repealed. A foreign jurisdiction clause is not an ouster clause. The principle of privity of contract applies equally to a foreign jurisdiction clause vis-à-vis other terms of the contract. The principle of severability applies to a foreign jurisdiction clause vis-a-vis other terms. It is not settled whether Nigerian courts can grant interim remedies in protection of a foreign jurisdiction clause. It has been recommended that Nigeria ratifies the Hague Convention on Choice of Court Agreements.

Nigerian courts have generally demonstrated a positive attitude towards the enforcement of arbitration clauses. There are very limited grounds on which the Nigerian court can refuse a stay of proceedings in breach of a foreign arbitration clause under the New York Convention. The Supreme Court of Nigeria, in a significant number of decisions, has held that an arbitration clause, including a *Scott v Avery* clause, is not an ouster clause. The principle of privity of contract applies equally to the arbitration clause, as to other terms. The principle of severability applies to an arbitration clause, as to other terms. It has been argued that a Nigerian court can enforce interim measures that protect the integrity of the arbitral tribunal.

Nigerian courts have the inherent common law powers to stay proceedings on the basis of *forum non conveniens*, not choice of venue rules. Nigerian courts would decline jurisdiction where the defendant establishes that another forum is more just and appropriate to resolve the dispute. Nigerian courts have inherent powers under common law to stay proceedings where such proceedings are already pending before another court on the basis of *lis alibi pendens.*

The Federal High Court can stay or dismiss proceedings in favour of an arbitral tribunal (in Nigeria or elsewhere) or a foreign court and grant the plaintiff security for costs in order to protect its interest. The claim must be a pending one brought on the merits of the case; the claimant cannot simply seek interim measures from the Federal High Court in anticipation of a judgment or award in a foreign forum.

7

Limitations on Jurisdiction

I. Introduction

There are instances where a court cannot assume jurisdiction over a claim which is otherwise competently brought before it. This may be due to the parties to the action, the cause of action, or the relief sought. The limitation on the jurisdiction of a court may be grounded in common law, statute, public international law, or a matter of public policy. This chapter focuses on private international law issues that arise in relation to limitations on jurisdiction. In this regard, this chapter addresses jurisdictional immunities and capacity to sue.

Jurisdictional immunity is a legal privilege attached to a person which ordinarily insulates or protects such a person from judicial action. It usually takes the form of immunity from suits and legal process and immunity from the execution of a court judgment. Immunity from suits and legal process insulates or protects a party from legal proceedings before a court so that such a party cannot be sued or compelled to attend court. Immunity from execution insulates or protects a party from the enforcement of a court judgment against [the party's] assets or property. The immunity granted to a person by law usually honours a state's international obligation or may simply be a matter of public policy.

II. Jurisdictional Immunities

A. Sovereign Immunity

There is no legislation in Nigeria that regulates sovereign immunity; that is, immunity of states and heads of governments. However, under customary international law, a foreign sovereign cannot be impleaded in the court of another sovereign in any legal proceedings either against his person or for recovery of specific property or damages, nor can his or her property be seized or property in possession be seized or detained by legal process.[1] Under the doctrine of sovereign immunity, the protection is available not only to the state and the head of state while

[1] *African Reinsurance Corporation v Fantaye* (1986) 3 NWLR 811.

personally in office, but also to the government of the state, its component parts, or any of their departments.[2]

The legal basis for sovereign immunity is expressed in the latin maxim, '*pari in parem imperium non habet*', which literally means that an equal has no authority over an equal. The sovereign or governmental acts of one state or country are not matters on which the court of another country will adjudicate.[3] The doctrine of sovereign immunity is also founded upon broad considerations of public policy, international law, and comity.[4]

B. Diplomatic Immunity

In Nigeria, the applicable law in respect of diplomatic immunities and privileges is the Diplomatic Immunities and Privileges Act, which implements aspects of the Vienna Convention on Diplomatic Relations 1961 (the 'Vienna Convention'). Under the Diplomatic Immunities and Privileges Act, foreign envoys, consular officers, members of their families, and members of their official and domestic staff are generally entitled to immunity from suit and legal process.[5] Such immunities may also apply to organisations declared by the Minister of External Affairs to be organisations the members of which are sovereign powers (whether foreign powers or Commonwealth countries or the governments thereof).[6]

Where a dispute arises as to whether any organisation or any person is entitled to immunity from suit and legal process, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact.[7]

A person (or international organisation) which raises and relies on the defence of diplomatic immunity from a suit or other legal process under the Diplomatic Immunity and Privileges Act has the duty to satisfy the trial court of the existence of facts which entitle it to immunity, in order to avail itself of the immunity provided under the law (Diplomatic Immunity and Privileges Act), and set itself free of the suit and any other legal processes of the courts in Nigeria, thereby divesting them of the crucial jurisdiction to entertain or adjudicate over the case.[8]

A person who is alleged to be immune from legal proceedings must first be a party to the action in order for such a party to make a claim of immunity under

[2] *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228; *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 785 (Muhammad JCA, as he then was).

[3] *African Reinsurance Corporation v AIM Consultants Ltd* (2004) 11 NWLR 223, 242–43.

[4] *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 785 (Muhammad JCA).

[5] Diplomatic Immunities and Privileges Act, Cap D9 LFN 2004 ss 1, 3–6.

[6] ibid, ss 11 and 12.

[7] ibid, s 18.

[8] *Vese v West African Instutute for Financial & Economic Management* (2018) 2 NWLR 336, 353–54, 358–59 (Garba JCA).

the Diplomatic Immunities and Privileges Act.[9] A person or organisation may waive any immunity or privilege conferred under the Diplomatic Immunities and Privileges Act.[10] The immunity of a diplomat is only extant when the diplomat is on accreditation to a foreign country. Accordingly, the *former* Israeli Ambassador to Nigeria could be impleaded in Nigerian courts without his consent since he no longer held the position of a diplomat, consular officer, or a party immune from legal process under the Diplomatic Immunities and Privileges Act.[11]

Diplomatic immunity is somewhat related to sovereign immunity such that without the existence of sovereign immunity, diplomatic immunity would not arise.[12] However, diplomatic immunity under the Diplomatic Immunities and Privileges Act is not the same thing as sovereign immunity. The Diplomatic Immunities and Privileges Act only provides for diplomats, and not the sovereign state itself. The Act confers immunity on persons, both natural and artificial, who serve their state in another state. The Diplomatic Immunities and Privileges Act does not deal with sovereign immunity of states; states are not organisations as envisaged under Section 11 of the Act which provides for organisations declared by the order of the Minister as being constituted by sovereign powers or Commonwealth countries.[13]

Nigerian courts have interpreted the Diplomatic Immunities and Privileges Act in a number of cases. The first reported case to interpret the Diplomatic Immunities and Privileges Act was *Alhaji Ishola Noah v The British High Commissioner to Nigeria* ('*Noah*').[14] In *Noah*, the plaintiff on two occasions took out an originating summons against the British High Commissioner before the Supreme Court. The Supreme Court held, *inter alia*, that it was constitutionally incompetent to hear the suit on the ground that it had no original jurisdiction to hear the case. It also held in *obiter* that by virtue of Section 1(2) and (3) of the Diplomatic Immunities and Privileges Act, such an action against a foreign envoy in Nigeria would be void.

African Reinsurance Corporation v Fantaye ('*Fantaye*')[15] is significant because it is a Supreme Court decision and unlike the *Noah* case, it was not decided in *obiter*. Also, in subsequent cases, other Nigerian judges have relied on *Fantaye* in interpreting the Diplomatic Immunities and Privileges Act and making pronouncements on the subject of jurisdictional immunity.

[9] *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR 109, 138–39 (Salami JCA as he then was) – 'There is nothing in the legislation which the learned senior counsel for the respondent as well as the court relied upon to the effect that there cannot be publication to the ambassador because of "his personal immunity and his official staff covers inviolability of his residence". The Ambassador is not being sued for the publication to him of a defamatory document … It is only when the Ambassador was made a party to the action that he enjoys and could invoke the protection given to him'.

[10] Diplomatic Immunities and Privileges Act, Cap D9 LFN 2004 ss 2, 7 and 15.

[11] *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR 109, 139 (Salami JCA as he then was).

[12] *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 784 (Muhammad JCA).

[13] *Kramer Italo Ltd v Government of the Kingdom of Belgium* (2004) 103 ILR 299, 308 (Akpata JCA); *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 786–87 (Muhammad JCA).

[14] *Alhaji AG Ishola Noah v The British High Commissioner to Nigeria* (1980) FNLR 473.

[15] (1986) 3 NWLR 811.

In *Fantaye*, the defendant-appellant was an international organisation set up by agreement or treaty between Member States of the Organisation of African Unity and the African Development Bank.[16] The agreement was ratified by the Federal Military Government on 8 June 1976.[17] The defendant-appellant was also granted the status of an international organisation as specified under the Diplomatic Immunities and Privileges Act.

The plaintiff-respondent was employed by contract to work with the defendant-appellant. The plaintiff-respondent brought an action against the defendant-appellant in the High Court of Lagos State claiming damages for wrongful termination of his contract of employment. At first, the defendant-appellant entered a conditional appearance but appeared to reply to an application for an interim injunction brought by the plaintiff-respondent. Subsequently, the defendant-appellant challenged the court's jurisdiction and argued, pursuant to Section 11 of the Diplomatic Immunities and Privileges Act, that it was an international organisation which was immune from legal suits and proceedings. Pursuant to Section 18 of the Diplomatic Immunities and Privileges Act, it also relied upon a certificate issued by the Ministry of External Affairs recognising its status as an international organisation as a basis for the view that it was entitled to legal immunity from the suit.

At the High Court, the Court of Appeal, and the Supreme Court, the main provisions for consideration were found in the Diplomatic Immunities and Privileges Act and the Agreement Establishing the African Reinsurance Corporation (the 'Agreement' or the 'African Reinsurance Corporation Order').[18] The court considered the provisions of Chapter IX of the Agreement, which is composed of Articles 46–53.

> *Article 46: Status, Immunities Exemption and Privileges*
>
> To enable the Corporation effectively fulfil its purpose and carry out the function entrusted to it, the status, immunities, exemptions and privileges set forth in this Chapter shall be accorded to the Corporation in the territory of each State member; and each State member shall inform the Corporation of the specific action which it has taken for such purpose.
>
> *Article 47: Status in Member Countries*
>
> The Corporation shall possess full juridical personality and, in particular, full capacity:
>
> (i) to contract;
> (ii) to acquire, and dispose of, immovable and movable property; and
> (iii) to sue.

[16] The Agreement Establishing the African Reinsurance Corporation ('The Agreement'), that was on 24 February 1976.

[17] *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113, 117 (Mohammed JCA); *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 819 (Eso JSC).

[18] Republic of Nigeria Official Gazette No 5 Vol 72, of 31 January 1985.

Article 48: Legal Process

1. Legal actions may be brought against the Corporation in a court of competent jurisdiction in the territory of a country in which the Corporation has its Headquarters, or has appointed an agent for the purpose of accepting service or notice of process, or has otherwise agreed to be sued.
2. Disputes arising from reinsurance contracts entered into by the Corporation shall be subject to conventional practices or to ordinary legal processes applicable to comparable business as shall be agreed in the respective contracts. In all cases, the Corporation and its property and assets wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.

Article 49: Immunity of Assets

Property and assets of the Corporation wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by the authorities of any member.

Article 50: Immunity of Archives

The archives of the Corporation and in general, all documents belonging to it or held by it, shall be immune from seizure wherever located in member States except in cases of disputes arising from reinsurance contracts.

Article 51: Freedom of Assets from Restriction

To the extent necessary to carry out the purpose and function of the Corporation and subject to the provisions of this Agreement, each member State shall undertake to waive and to refrain from imposing any administrative, practical and financial restrictions that would hinder in any manner the smooth functioning of the activities of the Corporation.

Article 52: Privilege for Communication

Official communications of the Corporation shall be accorded by each State the same treatment as it accords to the official communications of other international financial institutions of which it is a member.

Article 53: Waiver of the Corporation

The immunities, exemptions and privileges provided in this Chapter are granted in the interest of the Corporation. The Board of Directors may waive, to such extent and upon such conditions as it may determine, the immunities, exemptions and privileges provided in this Chapter in cases where its action would in its opinion further the interest of the Corporation.

Particular emphasis was placed on Articles 48 and 53 of the Agreement. The court considered, *inter alia*, two main issues. The first issue was whether Article 48 of the Agreement establishing the defendant-appellant was to be construed as a general waiver of immunity, thereby subjecting the defendant-appellant to suit and legal process without its consent. The second issue was whether the Certificate issued by the Ministry of External Affairs was conclusive as to the status of the defendant-appellant as an international organisation. The High Court and majority of the Court of Appeal held in the affirmative, but the Supreme Court in a unanimous decision allowed the appeal.

Ayorinde J at the High Court held that by virtue of the Diplomatic Immunities and Privileges Act, the defendant-appellant enjoyed legal immunity, which could be waived by virtue of Section 15 of the Diplomatic Immunities and Privileges Act. However, in applying the provisions of Article 48 of the Agreement, Ayorinde J held the following:

> It is easy to follow Article 48(1) that the Defendant Corporation (the Appellants) may be sued in a court of competent jurisdiction where it established an headquarter. It is not disputed that the Headquarter of the Defendant is within the jurisdiction of this court and notwithstanding any law or convention, the Defendant had agreed to be sued within Lagos State. From its Exh. 'AR1' Article 48(1) this court has jurisdiction. By making of Exh. 'AR1' which contained Articles 47 and 48 the defendant has waived the rights or privileges exemption or immunities now claimed. Section 15 of the Diplomatic Immunity Act 1962 allowed for a waiver of immunities. Chapter IX of Ex. 'AR1' is the best example of such waiver …
>
> The Agreement and precisely its Article 48(1) makes it possible to sue the Defendant in its Headquarter.[19]

Ayorinde J, in construing Section 18 of the Diplomatic Immunities and Privileges Act, also did not consider the certificate issued by the Ministry of External Affairs recognising the status of the defendant-appellant as an international organisation to be relevant to the determination of the case.

After the above decision of the High Court, the Minister of External Affairs issued the Diplomatic Immunity and Privileges (African Reinsurance Corporation) Order 1985 ('African Reinsurance Corporation Order') conferring the status of an international organisation on the defendant-appellant. The African Reinsurance Corporation Order was issued pursuant to the Act and gazetted on 31 January 1985.[20]

The defendant-appellant appealed against the decision of the High Court and, *inter alia*, relied on the African Reinsurance Corporation Order. The Court of Appeal, by a majority, dismissed the appeal. Mohammed JCA, in his leading judgment, held that the order issued by the Minister of External Affairs granted immunity to the defendant-appellant under the Diplomatic Immunities and Privileges Act, but this immunity had been waived by the terms of Article 48 of the African Reinsurance Corporation Order where it was sued in its headquarters (as in this case). In construing Articles 48 and 53 of the African Reinsurance Corporation Order (or the Agreement), Mohammed JCA (as he then was) held that:

> It is without doubt that Article 53 stands as a proviso to the provisions of the remaining articles in the Chapter. The framers of that Agreement were conscious of the immunity the Corporation enjoys in the member states of the Organisation. The Agreement is specific as to waiver of the immunity from suit where it says that legal action may be

[19] Quoted in *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 820 (Eso JSC).

[20] See also *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113, 117 (Mohammed JCA), 127 (Nnaemeka-Agu JCA).

> brought against the corporation in a court of competent jurisdiction in the territory of a country in which the Corporation has its Headquarters. I agree with the submission of the respondent that Articles 49, 50 and 51 are to provide for express immunity against interference with the appellant's properties and assets, archives, movement of its fund and right of communication. These areas of immunities will give ample protection to the appellant should a plaintiff succeed in legal action instituted by him by virtue of Article 48. Even in paragraph 2 of Article 48 the Agreement was specific in providing that in all cases, the Corporation and its property and assets wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.
>
> Article 53 is only saying that the Board of Directors of the Corporation could waive the immunities, exemption and privileges provided for in Chapter IX where condition for doing so arises and in the interest of the Corporation … Article 48 which provides that legal action may be brought against the Corporation, is without any ambiguity to its meaning and interpretation.[21]

Kutgi JCA (as he then was) concurred with the leading judgment, though he reached his decision on other grounds. He held, *inter alia*, that by virtue of Article 48 of the Agreement, the defendant-appellant was not covered by legal immunity so that the issue of waiver or submission never arose.[22] In the alternative, he opined that if the defendant-appellant was covered by legal immunity, then it had waived such immunity.[23] Kutgi JCA agreed with the trial judge and did not consider the certificate issued by the Minister of External Affairs ('the Certificate') as relevant to the issue of whether the defendant-appellant was immune from legal proceedings. Kutgi JCA's decision is worth quoting as it would also be utilised as a basis for arguing that the Supreme Court got it wrong in *Fantaye*. He held that the certificate:

> clearly by itself confers no immunity whatsoever on the appellant. This must be so because the Diplomatic Immunities and Privileges Act No. 42 of 1962 (hereinafter called the Act) does not also by itself automatically confer immunities or privileges on international organisations. It is the First Schedule of the Act that contains a list of Immunities and Privileges applicable to International Organisations; while the Minister is enjoined under section 11(2)(a) of the Act, by an order in the gazette, to specify the extent of such immunities and privileges that any international organisation enjoys. So that although by EXH 'AR 5', the appellant was recognised to be an international organisation, it enjoyed no privileges or immunities unless and until the Minister said so and by an order in the gazette too … International Organisations are quite distinct and separate from foreign envoys and consular officers who have their immunities and inviolabilities conferred on them by the Act itself – long before they arrive in Nigeria. No further action of the Minister is required in respect of these people (see section 1(1) & (2) of the Act thereof).[24]

[21] *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113, 123–24 (Mohammed JCA).
[22] ibid, 131 (Nnaemeka-Agu JCA, as he then was).
[23] ibid, 133 (Kutgi JCA, as he then was).
[24] ibid, 132 (Kutgi JCA).

Nnaemeka-Agu JCA (as he then was) dissented, relying on the Diplomatic Immunities and Privileges Act, and in particular held that the Certificate issued by the Minister of External Affairs granted immunity to the defendant-appellant. In construing Article 48 of the African Reinsurance Corporation Order, he held that it had nothing to do with waiver; it was merely an enabling provision as to the rights of the Corporation to sue and be sued by reason of its corporate status. Nnaemeka-Agu JCA further held that Article 53 would have been unnecessary if Article 48 was meant to carry the implication of waiver, and in any event, a wholesale submission of the Corporation to the jurisdiction of the courts in its headquarter country in all cases would run counter to the accepted principles of international law.[25]

On appeal to the Supreme Court, the majority decision of the Court of Appeal was overturned. Though the decision of the Supreme Court was unanimous, the judgments of the Supreme Court Justices were somewhat varied. Eso JSC, in his leading judgment, held that by virtue of Sections 11 and 18 of the Diplomatic Immunities and Privileges Act, the defendant-appellant was conferred immunity from suit and legal process. In construing Article 48 of the Agreement, Eso JSC sustained the dissenting opinion of Nnaemeka-Agu JCA by holding that Article 48 of the Agreement could not be construed as a waiver.[26] To hold to the contrary would render the provisions of Article 53 of the Agreement otiose.[27]

Uwais JSC (as he then was), in his concurring judgment, held that the defendant-appellant was vested with diplomatic immunity.[28] However, he held that the African Reinsurance Corporation Order had not been enacted into law by the then Federal Military Government so that the plaintiff-respondent could not rely on Article 48 of the Agreement.[29] In addition, Uwais JSC held that the plaintiff could not benefit from Article 48 of the Agreement since it was not privy to the contractual arrangement that the defendant-appellant had set up.[30] In construing Article 53 of the Agreement, Uwais JSC held that the defendant-appellant could only waive its immunity through the approval of its Board of Directors (which was not the case here).[31]

Coker JSC concurred with Eso JSC and held that Article 48 of the Agreement did not constitute waiver of legal immunity as the immunity conferred on the defendant-appellant could only be waived by the Board of Directors under Article 53 of the Agreement.[32] Karibi-Whyte JSC was also of the view that Article 48 of the Agreement was merely an enabling provision which depended

[25] ibid, 133 (Nnaemeka-Agu JCA).
[26] *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 831 (Eso JSC).
[27] ibid, 831 (Eso JSC).
[28] ibid, 832 (Uwais JSC, as he then was).
[29] ibid, 834 (Uwais JSC).
[30] ibid, 834 (Uwais JSC).
[31] ibid, 835 (Uwais JSC).
[32] ibid, 836 (Coker JSC).

on Article 53 for its effectiveness, so that it was only the Board of Directors of the defendant-appellant that could validly waive its immunity.[33]

It is submitted that the Supreme Court decided incorrectly in *Fantaye*. Kutgi JCA was actually correct to hold that by virtue of the provisions of Article 48 of the Agreement, the defendant-appellant could be sued in its headquarters (as it was in this case), so that the issue of waiver consequently did not arise. In other words, Article 48 of the Agreement did not grant immunity to the defendant-appellant from legal suits, nor was it an enabling provision that was to be utilised where the Board of Directors waives the immunity of the defendant-appellant as provided for under Article 53 of the African Reinsurance Corporation Order. Perhaps what led Nnaemeka-Agu JCA and the Supreme Court to reach this conclusion is that they failed to distinguish between immunity from suits and immunity from execution of a judgment, which are different concepts. Immunity from suits relates to insulating a party from judicial proceedings against it, while immunity from execution relates to insulating a party from the enforcement of a court judgment. The purpose of Article 53 is that the Board of Directors of the defendant-appellant can waive immunity, but the immunity contained in Chapter IX of the African Reinsurance Corporation Order (including Article 48(2)) is mainly immunity from execution, and not immunity from suit and legal process.

Flowing from the above, the immunity granted to the defendant-appellant by order of the Minister under Section 11 of Act (and its first schedule) is actually dependent on what is specified in the African Reinsurance Corporation Order so that under Article 48 of the African Reinsurance Corporation Order, the defendant-appellant could be sued in its headquarters. Kutgi JCA, in his separate reasoning, was therefore correct to hold that the defendant-appellant was not immune from legal suits.[34] In addition, if Uwais JSC was correct to hold that Article 48 did not come into operation because the Agreement (as an international treaty) had not been successfully enacted into Nigerian law, then, by that same logic, the Agreement in its entirety cannot be regarded as having come into operation, so the defendant-appellant in this case could be successfully sued and have judgment enforced against it without any inhibition. It is also difficult to understand why Uwais JSC applied the doctrine of privity of contract in this case to the defendant-appellant, which was created by international convention in agreement with the then Organisation of African Unity and the African Development Bank. The purpose of the Agreement was for the benefit of persons having dealings with the defendant-appellant. If the contrary was the case, it is difficult to understand the practical utility of the Agreement.

In subsequent cases, the courts have tried to distinguish the Supreme Court's decision in *Fantaye*. In *African Reinsurance Corporation v AIM Consultants Ltd*

[33] ibid, 843–44 (Karibi-Whyte JSC).

[34] Section 11(2)(a) provides that the Minister may, from time to time, by Order in the Federal Gazette provide that any organisation shall to such extent as *may* be specified in the Order, have the immunities and privileges set out in the First Schedule to the Diplomatic Immunities and Privileges Act.

('*AIM Consultants Ltd*'),[35] the defendant-appellant and plaintiff-respondent entered into an agreement under which the plaintiff-respondent provided building construction consultancy services to the defendant-appellant. An article of the agreement stipulated that disputes between the parties shall be submitted to arbitration.

Subsequently, a dispute arose between the parties over the plaintiff-respondent's professional fees, which was referred to arbitration. At the conclusion of the arbitral proceedings, an award was made in favour of the plaintiff-respondent. The defendant-appellant was dissatisfied with the arbitral award and it filed an originating summons at the Lagos High Court to set aside the award, but the suit was dismissed by the trial court.

The defendant-appellant was dissatisfied with the dismissal of its suit and it appealed to the Court of Appeal. The plaintiff-respondent filed an originating summons at the High Court to enforce the arbitral award in its favour. In response, the defendant-appellant filed an application seeking to set aside the plaintiff-respondent's suit on the ground that the defendant-appellant was immune from legal process and that the court lacked jurisdiction to entertain the plaintiff-respondent's suit. The trial court took both the plaintiff-respondent's originating summons and the defendant-appellant's preliminary objection together and, in a consolidated ruling, dismissed the objection and ordered recognition and enforcement of the arbitral award in favour of the plaintiff-respondent.

The defendant-appellant was again dissatisfied with the ruling of the trial court and appealed to the Court of Appeal. The appeals of the defendant-appellant were consolidated. The defendant-appellant, *inter alia*, contended that it had immunity against legal process and execution under the Diplomatic Immunities and Privileges Act and the African Reinsurance Corporation Order. It also relied on the Supreme Court's decision in *Fantaye*. The Court of Appeal unanimously dismissed the appeal. Aderemi JCA (as she then was), in delivering the leading judgment, applied the doctrine of restrictive immunity. In this regard, she held that the defendant-appellant could not claim immunity under the Diplomatic Immunities and Privileges Act since it was engaged in a commercial transaction.

It is submitted that though the Court of Appeal in *AIM Consultants Ltd* came to the right decision, the reasoning for its decision is open to question. First, the Court of Appeal failed to pay attention to the construction of the Diplomatic Immunities and Privileges Act and the African Reinsurance Corporation Order. Instead, it focused on the application of the common law doctrine of restrictive immunity. Article 48(2) of the African Reinsurance Corporation Order made the defendant-appellant in this case immune from *execution*; a distinction should have been made between immunity from legal suits and immunity from execution. Such immunity from *execution* could only be waived by the appellant's Board of Directors under Section 53 of the African Reinsurance Corporation Order.

[35] (2004) 11 NWLR 223.

In *African Reinsurance Corporation v JDP Construction (Nig) Ltd* ('*JDP Construction (Nig) Ltd*'),[36] the plaintiff-respondent, by a written contract, agreed with the defendant-appellant to construct the defendant-appellant's head-office building at Victoria Island, Lagos for a tentative sum of US$6,234,989.66. One of the clauses in the agreement provided that the parties agreed to subject themselves to the jurisdiction of the High Court of Lagos State in the resolution of any dispute arising from the contract. The plaintiff-respondent completed the construction work and delivered possession of it to the defendant-appellant. The defendant-appellant acknowledged the delivery in writing. The defendant-appellant, however, refused to pay to the plaintiff-respondent the sum of US$2,755,618.85 which was outstanding out of the costs incurred in constructing the building. Consequently, the plaintiff-respondent instituted an action against the defendant-appellant at the High Court of Lagos State claiming the sum of US$2,755,618.85 as the sum due and payable to it on the building contract between the parties. The defendant-appellant, upon being served, entered a conditional appearance and filed a notice of preliminary objection challenging the jurisdiction of the trial court to entertain the matter. The ground of objection was that by virtue of the African Reinsurance Corporation Order, the defendant-appellant enjoyed diplomatic immunity. The High Court rejected this objection.

The defendant-appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal held that the diplomatic immunities and privileges which a foreign sovereign enjoys in Nigeria are largely determined by the common law, and that a foreign sovereign cannot claim immunity when it engages in trade, commerce or ordinary business activities. On further appeal to the Supreme Court, this ruling of the Court of Appeal was challenged on the ground that that view had earlier been rejected by the Supreme Court in *Fantaye* – a decision that is binding on the Court of Appeal. The Supreme Court unanimously dismissed the appeal. The Supreme Court held that the *Fantaye* decision was inapplicable on the ground that there was no proof of waiver in *Fantaye* and the case related to an employment contract (as opposed to a commercial relationship), whereas in *JDP Construction (Nig) Ltd*, the defendant-appellant could not claim immunity (or had waived it) because it was engaged in a commercial transaction with the plaintiff-respondent.[37] In addition, the plaintiff-respondent had also submitted to the jurisdiction of the Lagos High Court through a forum selection clause.[38]

It is submitted that though the conclusion of the Supreme Court's decision is correct, the Supreme Court should have simply given Article 48 of the African Reinsurance Corporation Order its literal interpretation to the effect that since the defendant-appellant was sued in its headquarters, the court could rightly assume jurisdiction. The Supreme Court should have taken the bold step of overruling its

[36] (2007) 11 NWLR 224.
[37] ibid, 234–35.
[38] ibid, 234–35.

decision in *Fantaye* instead of distinguishing it. The failure of the Supreme Court to declare *Fantaye* as wrongly decided was a missed opportunity.

In *Siewe v Cocoa Producers Alliance* ('*Siewe*'),[39] the plaintiff-respondent filed an action at the Federal High Court, Lagos division against the defendant-appellant, seeking to set aside the letter of termination of his employment, and an order that he be reinstated into his employment, and that all his salaries and allowances be paid up to date. The defendant-appellant challenged the jurisdiction of the Federal High Court on the ground that under Section 2 of the Diplomatic Immunities and Privileges (Cocoa Producers' Alliance) Order 1969 (the 'Cocoa Alliance Order'),[40] it enjoyed diplomatic immunity under the Act. The Federal High Court dismissed the challenge to its jurisdiction. On appeal, the Court of Appeal was invited to reconcile the apparent inconsistency between the Supreme Court decisions in *Fantaye* and *JDP Construction (Nig) Ltd*. The Court of Appeal unanimously allowed the appeal and also tried to reconcile the apparent conflict between *Fantaye* and *JDP Construction (Nig) Ltd* in relation to the facts of the case presented before it. The Court of Appeal held the following:

> Now where is the semblance of facts between the present application and the African Reinsurance Corporation v J.D.P Construction Ltd (supra) relied upon? In the latter, there was an express clause in the agreement waiving the diplomatic immunity.
>
> Secondly, the Supreme Court gave consideration to the nature of the transaction between the parties, which was of a commercial nature. In the present application, what is at stake is a contract of employment between the parties, the termination thereof and a claim for payment of all salaries and allowances up to date. The applicant has not stated any express clause between the parties on how to deal with a breach or wrongful act in their agreement.
>
> He has not shown whether a contract of employment constitutes a commercial activity as was considered by the Supreme Court in A.R.C v J.D.P Construction Ltd. This he needed to do, to bring the facts of the present application in line with J.D.P Construction Ltd case above. The appellant/applicant has not shown how the Respondent cannot be entitled to diplomatic immunity in accordance with the decision of the Supreme Court in Fantaye's case (supra). I need to mention here that, an action related to a contract of employment, it is of common knowledge, is an administrative action.[41]

It is submitted that although the Court of Appeal is bound by the Supreme Court's decisions, the Court of Appeal in *Siewe* should simply have given Section 2 of the Cocoa Alliance Order its literal interpretation, which is that the defendant-appellant shall be granted immunity from suit and legal process except in a particular case in which it has *expressly* waived its immunity. In the instant case, the defendant-appellant had not expressly waived its immunity.

[39] (2013) LPELR-22033 (CA).
[40] Entered into force on 22 January 1969. LN 22 of 1969.
[41] *Siewe v Cocoa Producers Alliance* (2013) LPELR-22033 (CA) 1, 23–24.

C. Absolute and Restrictive Immunity

Historically, the concept of sovereign immunity was absolute under common law so that the state or its representative could not be impleaded before a foreign court unless there was submission to the jurisdiction of the court. This doctrine of absolute immunity was regarded as unfair and one that could lead to unpleasant consequences, particularly in commercial transactions; it could enable a sovereign state and its representative to engage in commercial transactions but avoid its obligations or liability by relying on the doctrine of absolute immunity.

Some Nigerian courts have applied the restrictive doctrine of immunity in interpreting diplomatic immunity under the Diplomatic Immunities and Privileges Act, or a atatute or agreement made pursuant to the Act.[42] This is dubious for at least two reasons. First, the doctrine of sovereign immunity (and the associated concept of absolute and restrictive immunity) is a common law doctrine, while the doctrine of diplomatic immunity is created by the Diplomatic Immunities and Privileges Act. Second, the Diplomatic Immunities and Privileges Act does not make any distinction between restrictive and absolute immunity. It is submitted that some Nigerian judges may have applied the common law doctrine of restrictive immunity under the Diplomatic Immunities and Privileges Act as a form of judicial pragmatism in order to counter the unpleasant consequences that arise where the doctrine of diplomatic immunity is applied absolutely or strictly. This approach may also be justified on the basis that the application of the doctrine of restrictive immunity is another way of stating that a person claimed to be immune from legal proceedings has expressly waived its immunity (such as when entering into a commercial transaction).

The application of the common law doctrine of restrictive immunity in Nigeria was particularly influenced by the English jurisprudence on the subject. In *Trendtex Trading Corporation v Central Bank of Nigeria* ('*Trendtex*'),[43] the Central Bank of Nigeria was sued in the English Courts relating to a commercial transaction. Donaldson J held that the Central Bank of Nigeria was the alter ego of the Nigerian Government and a department of state, to which sovereign immunity extended. On Trendtex's appeal to the Court of Appeal, the majority allowed the appeal. Lord Denning MR, in his characteristically innovative manner, held that the doctrine of sovereign immunity does not apply where a state or its department is engaged in commercial transactions.[44] This position was approved by the House of Lords in *I Congreso del Partido*.[45]

[42] See generally *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113; *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811; *African Reinsurance Corporation v AIM Consultants Ltd* (2004) 11 NWLR 223; *African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224; *Siewe v Cocoa Producers Alliance* (2013) LPELR-22033 (CA).

[43] [1976] 3 All ER 438.

[44] *Trendtex Trading Corporation v Central Bank* [1977] 2 WLR 356.

[45] *Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido* [1981] 2 All ER 1064.

In *African Reinsurance Corp v Fantaye*,[46] Mohammed JCA (as he then was) held that the defendant-appellant was not immune from civil litigation once its stock in trade became a mercantile transaction.[47] At the Supreme Court,[48] Eso JSC and Karibi-Whyte JSC did not share the views of Mohammed JCA. Eso JSC held that the defendant-appellant was immune from legal proceedings irrespective of whether it was engaged in mercantile transactions.[49] Karibi-Whyte JSC was of the view that the relationship between the parties was one of employment and not a commercial relationship.[50] In the alternative, he also reached the same conclusion as Eso JSC by relying on the English authorities that supported the view that sovereign immunity also applied where the state or its representative is engaged in commercial transactions.[51]

Three points should be noted regarding *Fantaye*. First, the issue of whether there was absolute or restrictive immunity should not have arisen in this case. This view is based on the submission that was made earlier, that the Agreement setting up the appellant did not grant the defendant-appellant immunity from legal suits where it is sued in the jurisdiction of its headquarters. Second, the concept of restrictive immunity is technically a common law doctrine and its application under the Diplomatic Immunities and Privileges Act is open to question, as the provisions of the Diplomatic Immunities and Privileges Act, or the Agreement that was being construed, make no distinction between absolute and restrictive immunity. Third, though Nigerian courts are not bound by English decisions or any foreign authority, none of the Nigerian appellate Judges in *Fantaye* referred to the English authorities (discussed above) that support the view that sovereign or diplomatic immunity does not apply where the state or its representative is engaged in personal actions such as commercial transactions.

In *Kramer Italo Ltd v Government of the Kingdom of Belgium* ('*Kramer Italo*'),[52] the Belgian Embassy in Nigeria commissioned the plaintiff-appellant to build a residence for the Belgian Ambassador. The plaintiff-appellant brought an action against the Government of Belgium and the Belgian Embassy in Nigeria claiming reimbursement for additional expenses incurred in the performance of a building contract. The defendant-respondent submitted that the suit should be struck out on the ground of sovereign immunity and the entitlement of the embassy staff to diplomatic immunity. The Lagos State High Court dismissed the plaintiff-appellant's case. On appeal to the Court of Appeal, the plaintiff-appellant submitted, *inter alia*, that the restrictive doctrine of immunity should be applied so that the court can assume jurisdiction in a matter arising from a commercial transaction and that

[46] (1986) 1 NWLR 113.
[47] *African Reinsurance Corp v. Fantaye* (1986) 1 NWLR 113, 124 (Mohammed JCA).
[48] (1986) 3 NWLR 811.
[49] *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 830–31(Eso JSC).
[50] ibid, 844 (Karibi-Whyte JSC).
[51] ibid, 844–45 (Karibi-Whyte JSC).
[52] (2004) 103 ILR 299.

the contract to build the residence fell within the category of commercial transactions. The Court of Appeal dismissed the appeal. Three points are worth noting here. First, the Court of Appeal held that, in principle, the common law doctrine of sovereign immunity was not the same as diplomatic immunity, which is governed by the Diplomatic Immunities and Privileges Act.[53] Second, the Court of Appeal embarked on an extensive review of the English jurisprudence on the subject of sovereign immunity as well as the Supreme Court's decision in *Fantaye*. It came to the correct conclusion that the Supreme Court's pronouncement (particularly that of Karibi-Whyte JSC) on sovereign immunity in *Fantaye* was actually *obiter*, and Nigerian courts are not bound by the English jurisprudence on restrictive immunity championed by Lord Denning or indeed any English authorities on the subject of sovereign immunity.[54] In other words, Nigerian courts are free to accept or reject the English jurisprudence on the subject of restrictive immunity. Third, the Court of Appeal held that where a court chose to apply the restrictive doctrine, caution had to be exercised, especially where there was no statutory basis for its application. Sovereign immunity was to be denied only where a transaction was truly commercial in nature; it was the intrinsic nature of the transaction which was the primary consideration. A contract to build an ambassador's residence was not a purely commercial transaction. The rule of sovereign immunity was not inequitable; it was intended to protect a foreign state from the indignity of being forced to litigate in a foreign court and was universally accepted by states. Furthermore, to implead a foreign state on the basis of the actions of its embassy staff would undermine the basis of sovereign immunity. It had to be, therefore, definitively established that a strictly commercial transaction was at issue before the restrictive doctrine could be applied.[55]

It is submitted that the third ground of the Court of Appeal's decision is open to question. The classification of a building contract for the residence of an embassy as not being a commercial transaction in relation to attracting the application of the restrictive doctrine of immunity is a rather strange decision. This aspect of the decision in *Kramer Italo* could be regarded as unjust and lacking in commercial sense to the extent that it allows a foreign sovereign who enters into what is plainly a commercial transaction to evade its liability under the absolute doctrine of sovereign immunity. In this regard, the Court of Appeal should have been persuaded by the English case of *Planmount Ltd v Republic of Zaire*,[56] (which it referred to but did not agree with) that held that employing a contractor to repair the Ambassador's residence was not an act performed in a governmental capacity but in a private and commercial one and was therefore not covered by state immunity.

[53] *Kramer Italo Ltd v Government of the Kingdom of Belgium* (2004) 103 ILR 299, 308 (Akpata JCA).
[54] ibid, 308–9 (Akpata JCA).
[55] ibid, 310–11 (Akpata JCA).
[56] [1981] 1 All ER 1100.

In *African Reinsurance Corporation v AIM Consultants Ltd*,[57] the Nigerian Court of Appeal was persuaded by the English jurisprudence that favoured the application of restrictive immunity in commercial transactions, and held that an international organisation cannot claim diplomatic immunity under the Diplomatic Immunities and Privileges Act where it is engaged in commercial transactions.[58] Aderemi JCA (as she then was), who delivered the leading judgment for the Court of Appeal, observed that the Supreme Court in *Fantaye* appeared to overlook the English jurisprudence that favoured the restrictive doctrine of sovereign immunity in commercial transactions.[59] On the facts of *AIM Consultants Ltd*, however, it was unnecessary to make a finding on the doctrine of restrictive immunity. In interpreting the Diplomatic Immunities and Privileges Act, the decision was a progressive one that enhanced the effectiveness of commercial transactions.

In *Oluwalogbon v Government of the United Kingdom*,[60] the plaintiff-appellant sued the defendant-respondents jointly and severally for damages arising from the negligent conduct of the first defendant-respondent (the driver of the second defendant-respondent's vehicle) which resulted in a car accident in Lagos State. The Lagos High Court dismissed the plaintiff-appellant's case. On appeal, the Court of Appeal, in a unanimous decision, sustained the lower court's decision, although on different grounds.

The plaintiff-appellant, *inter alia*, made two significant grounds of appeal worth noting. The first ground of appeal was that the trial court wrongly applied the Diplomatic Immunities and Privileges Act to a case that should have been decided under the common law doctrine of sovereign immunity. Second, flowing from this first ground, it was argued that the doctrine of restrictive immunity should apply in this case to make the defendant-respondents liable. On the first ground, the Court of Appeal conceded that there was a great similarity between sovereign immunity and diplomatic immunity, as without sovereign immunity there would be no diplomatic immunity.[61] However, the Court of Appeal followed the correct approach in *Kramer Italo*[62] to the effect that diplomatic immunity is not the same thing as sovereign immunity. The Diplomatic Immunities and Privileges Act provides protection for diplomats and designated organisations, rather than the sovereign state itself. It is legislation that confers immunity on persons, both natural and artificial, who serve the state in another jurisdiction.[63] Thus, in the

[57] (2004) 11 NWLR 223.

[58] *African Reinsurance Corporation v AIM Consultants Ltd* (2004) 11 NWLR 223, 242–47 (Aderemi JCA, as he then was).

[59] ibid, 247 (Aderemi JCA).

[60] (2005) 14 NWLR 760.

[61] '[W]ithout state or sovereign immunity diplomatic and consular immunity would not have arisen. It is certainly the protection the state enjoys that is extended to such officers and organizations that serve the state in another state which recognises its immunity and agrees that same be extended to its officers and organisations as well'. *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 784 (Muhammad JCA).

[62] (2004) 12 CLRN 93, 103.

[63] *Oluwalogbon v Government of the United Kingdom* (2005) 14 NWLR 760, 786–87 (Muhammad JCA).

instant case, the Court of Appeal held that it was the common law doctrine of sovereign immunity that was to apply in this case.

In considering the second ground of appeal, Muhammad JCA (in his leading judgment), after a review of the Nigerian and English jurisprudence on the subject of absolute and restrictive immunity, conceded that he could not find a clear test that determines where a sovereign can be impleaded before a foreign court without its consent.[64] However, Muhammad JCA submitted that the common feature of the authorities was that where the state indulges in undertakings that are untoward and irreconcilable with the state's superior authority, the state or sovereign risks losing its immunity in the event of any action arising from such undertakings.[65] Muhammad JCA was also of the view that the determination of when a state would be impleaded without its consent in a Nigerian court is ultimately a matter of principled judicial discretion.[66] In applying the test of superior authority, Muhammad JCA suggested that a sovereign or its servant could be impleaded before the Nigerian court where it engages in commercial transactions or terrorist activities, but not in cases of tort. On this basis he concluded that the defendant-respondents could not be impleaded in the Nigerian court without their consent since the case related to the tort of negligence.[67] Salami JCA (as he then was) delivered a concurring judgment that shared the same reasoning and conclusion of Muhammad JCA.[68]

In *United Bank for Africa Plc v BTL Industries Ltd*,[69] Onu JSC observed in *obiter* that a state or its department (such as the Central Bank of Nigeria in this case) is not immune from judicial proceedings where it engages in commercial transactions, on the bases that it both frustrates the effectiveness of international commercial transactions and does not promote national economic development.[70]

In *African Reinsurance Corporation v JDP Construction (Nig) Ltd*,[71] which was discussed earlier, the Supreme Court held that the defendant-appellant was not immune from legal proceedings when it engaged in commercial transactions. The Supreme Court actually regarded the defendant-appellant's participation in a commercial transaction as a waiver of its immunity.[72] In this regard, it appears the Supreme Court did not follow the approach of Eso JSC and Karibi-Whyte JSC in *Fantaye*.

In *Zabusky v Israeli Aircraft Industries*,[73] Salami JCA (as he then was) held in *obiter* that a diplomatic agent, head of mission, or a member of the diplomatic

[64] ibid, 785 (Muhammad JCA).
[65] ibid, 785–86, 789–90 (Muhammad JCA).
[66] ibid, 789–90 (Muhammed JCA).
[67] ibid, 789–90 (Muhammed JCA).
[68] ibid, 792–93 (Salami JCA).
[69] (2006) NWLR (Pt. 1013) 61; (2005) LPELR-8065 (SC), 22.
[70] (2006) NWLR (Pt. 1013) 61; (2005) LPELR-8065 (SC), 22.
[71] (2007) 11 NWLR 224.
[72] *African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224, 234–35 (Akintan JSC).
[73] (2008) 2 NWLR 109.

corps cannot be sued in his or her personal capacity by virtue of Section 1(1) of the Diplomatic Immunities and Privileges Act for libel or slander except in relation to any professional or commercial activity.[74]

In *Siewe v Cocoa Producers Alliance*,[75] the Court of Appeal held that the defendant-appellant, which claimed to have diplomatic immunity under the Diplomatic Immunity and Privileges Act, could not be stripped of immunity or regarded as having waived its immunity under Section 2 of the Diplomatic Immunities and Privileges (Cocoa Producers' Alliance) Order 1969 (the 'Cocoa Alliance Order') by reason of an employment relationship with the plaintiff-respondent, or the fact that the claimant-respondent made a complaint to the Minister of External Affairs and to the Police against the defendant-appellant to stop parading itself as entitled to diplomatic immunity.[76]

D. Submission and Waiver

The diplomatic or sovereign immunity of a legal person may be waived prior to or during judicial proceedings. At common law, the doctrine of sovereign immunity requires that the sending state approve the waiver or submission to the court's jurisdiction.[77] Under the Diplomatic Immunities and Privileges Act, diplomatic immunity can be waived without the authorisation of the sending state.[78] Where a legal person who is ordinarily immune from judicial proceedings waives its immunity or submits to the court's jurisdiction, the court can assume jurisdiction over such a legal person.

Under the common law doctrine of sovereign or diplomatic immunity, submission may be implied or express, while, under the Diplomatic Immunities and Privileges Act, submission is usually express and not implied.[79] Submission could take the form of a dispute resolution agreement or entering an unconditional appearance before the court.[80] Some Nigerian judges have also regarded the application of the common law doctrine of restrictive immunity (such as when entering into a commercial transaction) as a form of waiver of the person's diplomatic immunity,[81] while other Nigerian judges have regarded such a scenario as one where the person has no legal immunity rather than waiver of the

[74] *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR 109, 139–40.

[75] (2013) LPELR-22033 (CA).

[76] *Siewe v Cocoa Producers Alliance* (2013) LPELR-22033 (CA) 1, 24–25.

[77] *Dimitrov v Multichoice (Nig) Ltd* (2005) 13 NWLR 575, 595 (Akaahs JCA).

[78] ibid, 595 (Akaahs JCA).

[79] *African Reinsurance Corporation v Fantaye* (1986) 3 NWLR 811.

[80] *African Reinsurance Corporation v AIM Consultants Ltd* (2004) 11 NWLR 223; *African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224.

[81] *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113, 121 (Mohammad JCA); *African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224, 234–35 (Akintan JSC); *Siewe v Cocoa Producers Alliance* (2013) LPELR-22033 (CA) 23–25.

legal immunity.[82] A legal person who is ordinarily immune from legal proceedings, however, cannot submit to the jurisdiction of a Nigerian court which is not ordinarily allowed to assume jurisdiction by law.[83]

This section analyses the case law authorities of the appellate courts on the subject of submission and waiver to the jurisdiction of the Nigerian court in chronological order. *John Grisby v Jubwe* ('*Jubwe*'),[84] was the first reported Nigerian case to deal with the subject of waiver or submission to the jurisdiction of the court and it was decided under common law, before the enactment of the Diplomatic Immunities and Privileges Act. In *Jubwe*, the plaintiff-respondents claimed about £622 as general damages, occasioned by the unlawful interference by the defendant-appellant with a contract of labour between the plaintiffs and Elder Dempster Lines Ltd. The plaintiffs filed a statement of claim, and 10 days later, the defendant filed what he labelled as a statement of defence, whereby he claimed to be exempted from the jurisdiction of the courts on the ground of diplomatic immunity. In that statement, the defendant did not answer the allegations of fact contained in the plaintiff's statement of claim. The court held that the defendant had submitted to the jurisdiction of the court and the defence that he filed was valueless. On appeal to the West African Court of Appeal, Coussey JA, in delivering the judgment with which de Commamond Ag CJ and Foster-Sutton P concurred, held the following:

> As to the first ground of appeal that the court erred in holding that there was submission to the jurisdiction of the Court, it is unnecessary to decide the point whether as Liberian Consul, the defendant was exempted from the jurisdiction as he had clearly attended the Court both on a motion and on a return date, he had thereby submitted to the jurisdiction by opposing the plaintiff's motion and accepting an order for pleadings.[85]

In *African Reinsurance Corp v Fantaye*[86] (discussed earlier), the defendant-appellant entered a conditional appearance before the court without stating grounds for challenging the jurisdiction of the court. The defendant-appellant subsequently participated in proceedings by opposing a motion for an interim injunction and filing a statement of defence. The Court of Appeal, relying on *Jubwe*, held that the subsequent conduct of the defendant-appellant after it filed a conditional appearance amounted to submission and waiver of immunity to the jurisdiction of the trial court.[87] Nnaemeka-Agu JCA (as he then was) dissented. He was of the view that waiver under common law, as it was in *Jubwe*, was different from waiver under the Diplomatic Immunities and Privileges Act so that

[82] *African Reinsurance Corporation v AIM Consultants Ltd* (2004) 11 NWLR 223, 242–7 (Aderemi JCA); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR 109.
[83] *Dimitrov v Multichoice (Nig) Ltd* (2005) 13 NWLR 575.
[84] (1952–1955) 14 WACA 637.
[85] Cited in *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 826 (Eso JSC).
[86] (1986) 1 NWLR 113.
[87] *African Reinsurance Corp v Fantaye* (1986) 1 NWLR 113, 121 (Mohammed JCA).

while waiver under common law could be implied, waiver under the Diplomatic Immunities and Privileges Act must be express.[88]

On appeal to the Supreme Court, the dissenting opinion of Nnaemeka-Agu JCA was upheld. Eso JSC agreed with the holding of Nnaemeka-Agu JCA that the decision in *Jubwe* was decided under common law, rather than the Diplomatic Immunities and Privileges Act, so that *Jubwe* could not be used to interpret the Diplomatic Immunities and Privileges Act.[89] Eso JSC thus submitted that 'A fortiori, the person in whose favour privilege of immunity is presumed, *must be shown* to have waived it *knowing* fully well what he or it is doing' (emphasis added).[90] In the alternative, Eso JSC held that there was no waiver of immunity or submission to the jurisdiction of the court because 'the Appellants entered *only a conditional appearance*. They filed an application to *set aside the writ* on the ground of immunity in favour of the Appellants (emphasis added).'[91] Uwais JSC (as he then was) concurred with the leading judgment and held that it could not be said with certainty that the defendant-appellant had waived its immunity because it entered a conditional appearance.[92] In addition, Uwais JSC (as he then was) relied on Section 2(2) of the African Reinsurance Corporation Order to the effect that there must be express waiver by the defendant-appellant before it could be shown that the defendant-appellant had submitted to the jurisdiction of the court.[93] Coker JSC held that under the Diplomatic Immunities and Privileges Act, the right to the immunities and privileges may be claimed at any time, and, in the case of legal processes, at any stage of the proceedings; any waiver of the right to immunity must be express and clear and cannot be implied or inferred by the conduct of the person or organisation.[94] Coker JSC distinguished *Jubwe* on the basis that *Jubwe* was decided on

> the principle of estoppel by conduct. The defendant, it was held, had submitted to the jurisdiction of the court by not appearing under protest having filed a defence to statement of claim. Unlike in this case, the defendant entered a conditional appearance.[95]

Karibi-Whyte JSC held that the:

> Appellants never submitted to the jurisdiction of the court having entered a conditional appearance, and subsequently filed an application to set aside the writ of summons on the ground of their immunity from legal process. There has been sufficient evidence that Appellants were entitled to diplomatic immunity. It has not been established that this immunity has been waived.[96]

[88] ibid, 127–30.
[89] *African Reinsurance Corp v Fantaye* (1986) 3 NWLR 811, 826 (Eso JSC).
[90] ibid, 831 (Eso JSC).
[91] ibid, 831 (Eso JSC).
[92] ibid, 834–35 (Uwais JSC).
[93] ibid, 834–35 (Uwais JSC).
[94] ibid, 836.
[95] ibid, 836 (Coker JSC).
[96] ibid, 845 (Karibi-Whyte JSC).

Though the correctness of the Supreme Court's decision in *Fantaye* was criticised above in relation to how the court interpreted the African Reinsurance Corporation Order, it is submitted that the decision is sound on the issue of waiver of immunity to the jurisdiction of the court under the Diplomatic Immunities and Privileges Act.

In *African Reinsurance Corp v AIM Consultants Ltd*,[97] the correctness of the Court of Appeal's decision can be justified on the basis that a choice of arbitral tribunal to resolve disputes between the parties constitutes a waiver of diplomatic immunity to the jurisdiction of the court.

In *Dimitrov v Multichoice (Nig) Ltd*,[98] the plaintiff-appellants were the Bulgarian Ambassador to Nigeria and the Embassy of the People's Republic of Bulgaria, which claimed against the defendant at the Federal High Court for libel. When the matter came before the Federal High Court, the Judge *suo motu* raised the issue of jurisdiction of the court to entertain the matter and thereupon called on counsel to address him on the competence of the action before the court. In its ruling, the trial court held the plaintiff-appellants, by instituting the action for the tort of libel, had waived their diplomatic immunity and consequently should be treated as ordinary litigants. The trial court exercised the powers vested in it under Section 22(2) of the Federal High Court Act, 1976 to transfer the matter to the Lagos High Court. The plaintiff-appellants were dissatisfied with the ruling of the trial court and appealed to the Court of Appeal. The Court of Appeal allowed the appeal.

The Court of Appeal considered the provisions of Sections 1 and 15 of the Diplomatic Immunities and Privileges Act and Sections 251(h), 252 and 272(1) of the 1999 Constitution. The Court of Appeal reaffirmed the position that waiver of diplomatic immunity must always be express, but also held that the initiation of proceedings precludes the plaintiff (or person claimed to be immune in this case) from invoking the immunity from jurisdiction in respect of any counter-claims directly connected to the principal claim.[99] However, the Court of Appeal held that:

> it is the Federal High Court that will exercise exclusive jurisdiction over their matters because diplomatic and consular matters are reserved under Section 251(1)(h) for that court and the High Court of a State cannot share the jurisdiction with the Federal High Court. The waiver of immunity which the plaintiffs exercised to enable them submit themselves to the jurisdiction of Nigerian Courts did not make them become ordinary citizens … Moreover the plaintiffs could not waive the issue of the court exercising jurisdiction and submit to the court whose jurisdiction has been ousted by section 251(1)(h) of the Constitution.[100]

[97] (2004) 11 NWLR 223.
[98] (2005) 13 NWLR 575.
[99] *Dimitrov v Multichoice (Nig) Ltd* (2005) 13 NWLR 575, 595.
[100] ibid, 595 (Akaahs JCA, as he then was).

In *African Reinsurance Corporation v JDP Construction (Nig) Ltd*,[101] the Supreme Court, in distinguishing its previous decision in *Fantaye*, held that the parties' agreement to submit their dispute to the Lagos High Court constituted submission to the jurisdiction of the court so that the defendant-appellant had accordingly expressly waived its immunity under the Diplomatic Immunities and Privileges Act.[102]

III. Capacity to Sue

The question sometimes arises as to whether a person has the capacity to invoke the jurisdiction of a court. This issue may arise in the context of persons such as alien enemies, foreign companies, foreign liquidators, trustees, and other representatives. In this section, special focus is placed on the capacity of a foreign company to sue in Nigeria, as it is an issue that has significantly arisen before the courts.

No action can be brought by or against any party other than a natural person or persons unless such party has been given, by statute, expressly or impliedly, or, by the common law, either (a) a legal persona under the name by which it sues or is sued; or (b) a right to sue or be sued by that name. As to (a), namely where legal persona is *given*, this may be subdivided into: (i) corporations sole; (ii) corporations aggregate, bodies incorporated by statute or under the Companies and Allied Matters Act; (iii) bodies incorporated by foreign law; and (iv) *quasi*-corporations constituted by legislation. As to (b), this represents parties which are not legal *persona*, but have a right to sue and be sued by a particular name. These may be subdivided into: (i) partnerships; (ii) trade unions and friendly societies; (iii) foreign institutions authorised by their own law to sue and be sued, but not incorporated.[103]

A plaintiff's capacity to sue should not to be confused with the question of standing to sue (or *locus standi*). A plaintiff must be accorded legal recognition before any question of standing can arise. The question of the existence of legal personality relates to the very existence of the plaintiff, or, as the case may be, the defendant, whereas the question of *locus standi* relates to the existence of the right of the plaintiff, a natural or artificial person, to sue.[104]

The proper stage at which a defendant should raise a preliminary objection to the plaintiff's capacity to sue should either be at the inception or at the early stage of the proceedings. It should be done by the defendant entering a conditional appearance and contesting the issue before the statement of defence is filed and

[101] (2007) 11 NWLR 224.
[102] *African Reinsurance Corporation v JDP Construction Nig (Ltd)* (2007) 11 NWLR 224, 234–35.
[103] *Fawehinmi v NBA (No 2)* (1989) 2 NWLR (Pt. 105) 558; *Bank of Baroda v Iyalabani Company Ltd* (2002) 13 NWLR 551, 588–89.
[104] *Bank of Baroda v Iyalabani Company Ltd* (2002) 13 NWLR 551, 592.

trial commences.[105] Where the legal capacity of the plaintiff is challenged by the defendant, the onus is on the former to prove its legal capacity. This burden of proof can be discharged by leading evidence, oral or documentary, in proof of the same.[106]

The capacity of a foreign company to sue in Nigeria is regulated by the Companies and Allied Matters Act 1990.[107] In *In re Gresham Life Assurance Society (Nig) Ltd: Gresham Life Assurance Society (Nig) Ltd v Ochefu*,[108] which was decided prior to the commencement of the Companies and Allied Matters Act, the plaintiff-appellant company petitioned the High Court of Lagos State for a winding-up under the supervision of the court. The plaintiff-appellant was an insurance company incorporated outside Nigeria and was registered in Nigeria under Section 239 of the Companies Act. The petitioner-appellant had no established place of business in Nigeria and carried on business in Nigeria through the agency of another insurance company at a place of business occupied by the latter company. After the coming into force of Part X of the Companies Decree 1968, the petitioner-appellant, by its attorney and general manager of its agent company, informed the Registrar of Companies that it did not intend to carry on business in Nigeria, and instituted the present proceedings for winding-up under the supervision of the court under Section 369(3) of the Companies Decree 1968. The petition was opposed by a policy-holder and creditor who had a pending action against the petitioner-appellant for breach of contract.

The High Court (George J) dismissed the petition on grounds, *inter alia*, that the petitioner-appellant had no established place of business in Nigeria so that Section 369(3) of the Companies Decree did not apply. On appeal, the [then] Supreme Court of Nigeria, Lagos dismissed the appeal.

Elias CJ held that a clear distinction is to be drawn between a foreign company which has no branch office in Nigeria and is transacting business by an agent in Nigeria, and such a company transacting business through an agent in Nigeria where the agent has no hand in the management of the company and receives only customary agent's commission. In the latter case, the agent's place of business in Nigeria is not the company's place of business; the company has no established place of business in Nigeria, is not resident in Nigeria, and a Nigerian court has no jurisdiction to entertain a winding-up petition by the company.[109]

It is submitted that the High Court, Supreme Court, and counsel to the parties missed the point in this case. Sections 368–370 of the Companies Decree, which were being construed, have nothing to do with the capacity of a foreign company to sue in Nigeria; they are simply concerned with the requirements to be fulfilled for

[105] *Prospect Textile Mills Nigeria Ltd v Imperial Chemical Industries Plc England* (1996) 6 NWLR 668, 689.

[106] *Bank of Baroda v Iyalabani Company Ltd* (2002) 13 NWLR 551, 572 (Ogundare JSC).

[107] Prior to this, it was regulated by the Companies and Allied Matters Act 1968 and the common law.

[108] (1973) NCLR 215.

[109] *In re Gresham Life Assurance Society (Nigeria) Limited: Gresham Life Assurance Society (Nigeria) Limited v Ochefu* (1973) NCLR 215, 224–25.

a foreign company to have a place of business in Nigeria. Indeed, there is no provision contained in the Companies Decree 1968 that deals at all with the capacity of a foreign company to sue; the Supreme Court should have applied a gap-filling approach by either resorting to common law or providing pragmatic grounds that recognised the capacity of a foreign company to sue and be sued in Nigeria. In this regard the Supreme Court's decision in *In re Gresham Life Assurance Society* should be regarded as *per incuriam*. Moreover, in later cases, Nigerian appellate courts did not follow the approach in *In re Gresham Life Assurance Society* (though without explicitly overruling it).

In *Wema Bank Ltd v Nigeria National Shipping Line Ltd* ('*Wema Bank Ltd*'),[110] which was decided prior to the Companies and Allied Matters Act 1990, the applicant sought to be joined as a party to a suit in which its interests were adversely affected. The applicant, a West German firm with a representative in Nigeria, shipped goods to Nigeria on an irrevocable letter of credit issued by the plaintiff, a commercial bank, on behalf of a Nigerian company. Following an alleged breach of contract, the plaintiff bank sued the carriers, seeking to compel them to deliver the goods and an injunction to prevent them from returning the goods to the applicant. The applicant asked to be joined as a party to the suit.

The plaintiff opposed the application, asking the court to set it aside for irregularity, on the ground that the applicant was a foreign company which had not been incorporated in Nigeria according to the provisions of the Companies Decree 1968 and was therefore not a juristic person with the power of suing and being sued. The applicant contended, *inter alia*, that the plaintiff bank's argument was on the issue of incorporation and not on the capacity to sue, and that the law does not bar a foreign company from redress when its rights are infringed by a Nigerian.

The court dismissed the application insofar as it related to joining the applicant, but allowed the applicant's attorney to be joined as its duly appointed representative within the jurisdiction. The court (Phil-Ebosie P) held that although a foreign company operating in Nigeria is a juristic person, it only acquires the power to sue and be sued in its own name when it is incorporated in Nigeria according to the provisions of the Companies Decree 1968; without incorporation it can sue and be sued only in the name of its validly appointed representative within the jurisdiction. For the reasons advanced in respect of regarding the decision in *In re Gresham Life Assurance Society* as decided *per incuriam*, it is submitted that *Wema Bank Ltd* was also decided *per incuriam*.

In subsequent cases, Nigerian appellate courts have applied a commercially pragmatic approach to fill the gap in the absence of a clear provision on the capacity of a company to sue under the Companies Decree 1968. Thus, in *Kitchen Equip (WA) Ltd v Staines Catering Equip International Ltd* ('*Kitchen Equip (WA) Ltd*'),[111] which was decided prior to the Companies and Allied Matters Act 1990, the Court

[110] (1976) NCLR 68.
[111] Unreported Appeal No FCA/L/17/82 of 28 February 1983.

of Appeal held that a registered foreign company (though not registered in Nigeria) can sue and be sued in Nigeria. The Court of Appeal pragmatically held that:

> In as much as a Nigerian who goes to Harrods to buy goods on credit can be sued by Harrods in Nigerian Courts, so also can a British Company from whom a Nigerian had bought goods and has not paid be sued in Nigerian Courts. There is basis for reciprocity in international relations and no nationalistic feelings or thoughts should destroy this fundamental rule in international relations.[112]

In *Nigerian Bank for Commerce & Industry Ltd v Europa Traders (UK) Ltd*,[113] which was decided prior to the Companies and Allied Matters Act 1990, the plaintiff-respondent was an English company that commenced an action in the High Court of Lagos through its managing director against the defendant-appellants. The defendant-appellants subsequently brought an application praying that the action be dismissed because there were no proper parties and the pleadings disclosed no reasonable cause of action. The trial judge held that the mistake in the name of the appellant was not fatal and struck out the application to dismiss the action.

The defendant-appellant appealed to the Court of Appeal contending that the trial judge should have dismissed the action since there was no proper defendant before the court and that the plaintiff-respondent was a fictitious body and non-resident in Nigeria.

The Court of Appeal unanimously dismissed the appeal and held, *inter alia*, that a registered British Company can sue and be sued in Nigeria, and there is no burden on a foreign company suing in Nigeria to establish that it is a registered company in its home country and that its agent through which it sues is resident in Nigeria until the actual trial begins in court. In this regard, the Court of Appeal placed reliance on its previous decision in *Kitchen Equip (WA) Ltd*.

In *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S*,[114] which was decided prior to the Companies and Allied Matters Act 1990, the defendant-appellant was a company registered in Nigeria that engaged in large-scale agriculture and had placed an order for a feed-mill machine as well as spare parts with the plaintiff-respondent. The plaintiff-respondent was a limited liability company with its registered office in Copenhagen, Denmark which carried on the business of manufacturing and marketing agricultural machines. There was a dispute relating to the obligations of both parties under the contract, upon which the plaintiff-respondent sued the defendant-appellants. The trial court held, *inter alia*, that the plaintiff-respondent was not capable of suing in its name, having not been registered to carry on business in Nigeria. The trial court placed reliance on Sections 368–370 of the Companies Decree 1968 (as was the case in *In re Gresham Life Assurance Society* and *Wema Bank Ltd*).

[112] *Kitchen Equip (WA) Ltd v Staines Catering Equip Int Ltd*, Unreported Appeal No FCA/L/17/82 of 28 February 1983.
[113] (1990) 6 NWLR 36.
[114] (1992) 4 NWLR 361.

The Court of Appeal allowed the appeal in part. In construing Sections 368–370 of the Companies Decree 1968, the Court of Appeal held that those provisions deal with a situation in which a foreign company seeks to do business in Nigeria, and merely stipulates conditions which it must comply with before it is competent to do so. Therefore, where a foreign company does not seek to come to Nigeria to do business, those sections do not apply and hence such a company is not required to register and open an office in Nigeria before it can institute an action in Nigerian courts. In other words, there are two distinct issues: first, under what conditions may a foreign company do business in Nigeria, and second, in what circumstances may a foreign company sue in Nigeria. The former is governed by the Companies and Allied Matters Act 1990. The latter is a private international law issue, and the jurisprudence implies that the Nigerian courts would recognise the capacity to sue the foreign company by virtue of the legal personality conferred on it abroad.

On the issue of the right of a foreign company to sue and be sued in Nigeria, the Court of Appeal (Salami JCA as he then was) rightly held that it could not find any statutory provision in Nigeria which authorises a company to sue and be sued in its corporate name when it is not registered in Nigeria. Salami JCA thus made recourse to Order 37 rule 10 of the High Court (Civil Procedure) Rules, which provides that where no provision is made under the rules or any other written laws, the procedure and practice in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, be in force in the court. In applying the English common law position, Salami JCA (as he then was) held as follows:

> The respondent pleaded in its statement of claim that it was incorporated as a limited liability company in Denmark, an allegation which was not proved. No iota of evidence was adduced in support of that averment. However, the appellant admitted the fact which is taken as proved. The respondent can, therefore, come before the High Court of Oyo State without its being registered here in its own right except [if] it can be shown that it is voluntarily resident in an enemy controlled territory or that the respondent is controlled by enemies …
>
> It follows, therefore, that the respondent a foreign company can sue and be sued in its corporate or registered name even though it is not locally registered and without the requirement of its suing through an agent. It can sue in its own right.[115]

On appeal to the Supreme Court, the appeal was unanimously dismissed and the Supreme Court (Ayoola JSC) held that:

> The principle of law that a foreign corporation, duly created according to the laws of a foreign state recognised by Nigeria, may sue or be sued in its corporate name in our courts is part of the common law. The suggestion that a foreign company duly incorporated outside Nigeria should first be registered in Nigeria under the provisions of the Companies Act 1968 (which was then the applicable statute) dealing with registration

[115] *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S* (1992) 4 NWLR 361.

> of foreign companies, notwithstanding that it does not fall into the category of 'foreign company' as defined by that Act, is too preposterous and patently inimical to international trade, to merit any prolonged or serious consideration. It suffices to say that the appellant company which was admitted by the respondent to be a limited liability company with its registered office in Copenhagen properly sued in its corporate name.[116]

Bank of Baroda v Iyalabani Company Ltd[117] also applied common law in determining the question of the capacity of a foreign company to sue in Nigeria under the Companies Decree 1968. The Supreme Court held that not every corporate body that comes before the court is registered under Nigerian law. It is a principle of common law, and this is accepted in Nigeria, that a corporation incorporated in a foreign country may sue or be sued in Nigeria. This is not uncommon in Nigerian courts.[118] Nigerian courts recognise as juristic persons corporations established by a foreign law by virtue of the facts of their creation and continuance under and by virtue of that law. Such recognition is said to be by the comity of nations. Such a foreign company is permitted to sue, upon evidence being given of the proper instruments whereby it was effectually created as a corporation under the law of the foreign country. But as the creation depends on the act of the foreign state which created it, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of Nigerian law. The will of the sovereign authority which created it can also destroy it. Nigerian law will equally recognise the one as the other fact. It follows that whether a corporation has continued in existence or has been dissolved is likewise governed by the law of its place of incorporation.[119]

The enactment of the Companies and Allied Matters Act 1990 made express provisions for a foreign company to sue and be sued in its corporate name or that of its agent (under section 60(b)) despite the fact that it is not a registered or incorporated company in Nigeria for the purpose of carrying on business (under Section 54).

In *Companhia Brasileira De Infraestrutura (INFAZ) v Companhia Brasileira De Entrepostos e Commercio (COBEC) (Nig) Ltd*,[120] the plaintiff-appellant was a company allegedly registered in accordance with Brazilian law. The plaintiff-appellant was also a shareholder with some Nigerian persons, which constituted the defendant-respondent company. There was a change in the name of the plaintiff-appellant to Companhia Brasileira De Infraestutura Fazendaria, which was allegedly in accordance with Brazilian law. The plaintiff-appellant prayed for the winding-up of the defendant-respondent company. The application was

[116] *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 197 (Ayoola JSC). See also *INFAZ v COBEC* (*Nig*) *Ltd* (2018) 12 NWLR 127, 132 (Aka'ahs JSC).

[117] (2002) 13 NWLR 551.

[118] *Bank of Baroda v Iyalabani Company Ltd* (2002) 13 NWLR 551, 588 (Ogundare JSC).

[119] ibid, 573–74 (Ejiwunmi JSC).

[120] (2004) 13 NWLR 376.

dismissed by the trial court and the appeal to the Court of Appeal was dismissed as well. One of the issues for consideration was whether the plaintiff-appellant was competent to sue and be sued in Nigeria.

The Court of Appeal held that by virtue of Section 60 of the Companies and Allied Matters Act 1990, a foreign company not registered in Nigeria can sue and be sued in Nigerian courts provided that said foreign company was duly incorporated according to the laws of a foreign state recognised in Nigeria. But, if there is a change in the name of that foreign company, evidence of compliance with the law of the land where it was incorporated must be given. In the instant case, the Court of Appeal held that there was no material evidence placed before the court to establish the change of name of the plaintiff-appellant company, and the resolution for change of name in Brazil that was provided before the court was deemed insufficient.[121]

In *Edicomsa International Inc and Associates v CITEC International Estates Ltd*,[122] the plaintiff-appellant was a foreign company incorporated in the United States of America. However, it was not registered in Nigeria. The plaintiff-appellant was engaged by the defendant-respondent to provide some services. Subsequently, there was a disagreement between the parties on payments due to the plaintiff-appellant, which led to the action before the court. The defendant-respondent, *inter alia*, challenged the jurisdiction of the trial court on the basis that the plaintiff-appellant was not registered in Nigeria. The trial court upheld the submission of the defendant-respondent. The plaintiff-appellant appealed to the Court of Appeal, which unanimously allowed the appeal. The majority of the Court of Appeal rightly applied Section 60(b) of the Companies and Allied Matters Act 1990 to the effect that the plaintiff-appellant, though not registered in Nigeria, could sue in Nigeria.[123] Muhammad JCA (as he then was) reached the same conclusion as the majority but wrongly relied on the common law position instead of Section 60(b) of the Companies and Allied Matters Act 1990.[124]

IV. Conclusion

This chapter has discussed jurisdictional immunities and the capacity of foreign companies and other persons to sue in Nigeria. Regarding jurisdictional

[121] *Companhia Brasileira De Infraestrutura v COBEC (Nig) Ltd* (2004) 13 NWLR 376, 391, 395 (Aderemi JCA, as he then was). See also *Watanmal (Singapore) Pte Ltd v Liz Olofin and Company Plc* (1997) LPELR-6224(CA) 13 (Musdapher JCA as he then was); *NU Metro Retail (Nig) Ltd v Tradex SRL & Another* (2017) LPELR-42329 (CA) 41–42 (Garba JCA).

[122] (2006) 4 NWLR 114.

[123] *Edicomsa International Inc and Associates v CITEC International Estates Ltd* (2006) 4 NWLR 114, 125–26 (Rhodes-Vivour JCA, as he then was), 130 (Omage JCA).

[124] ibid, 128–29 (Muhammed JCA). See *NNPC v Lutin Investment Ltd* (2006) 2 NWLR 506, 538 where Ogbuagu JSC applied the common law in interpreting the capacity of a foreign company to sue in Nigeria, where it is not registered in Nigeria. See also *INFAZ v COBEC* (*Nig*) *Ltd* (2018) 12 NWLR 127, 132 (Aka'ahs JSC).

immunities, it was submitted, *inter alia*, that careful attention should be paid to the construction of the applicable statute in question. It is also recommended that the Supreme Court's decision in *African Reinsurance Corporation v Fantaye*[125] relating to the interpretation of the Diplomatic Immunities and Privileges (African Reinsurance Corporation) Order 1985 be overruled. It was also submitted that the doctrine of restrictive immunity applies in Nigeria particularly to situations where the state or its department engages in commercial transactions. In respect of the capacity to sue of foreign companies, it was submitted that it is now governed by Section 60(b) of the Companies and Allied Matters Act 1990, so that there is no need to resort to common law. A foreign company, though not registered in Nigeria, can sue and be sued under the Companies and Allied Matters Act.

[125] (1986) 3 NWLR 811.

PART III

Obligations

8

Contract

I. Introduction

The law that applies to a contract is one of considerable legal and commercial significance both in inter-State and international transactions. Where parties are determining the applicable law, it usually serves one main purpose – the difference in the application of one of those laws above the other usually provides a more favourable outcome for one of the parties. In other words, where there is no material difference in the applicable law, parties would rarely expend time and costs in debating it, nor would a court invite the parties to debate the point. Moreover, Nigerian courts would not apply foreign law as a matter of course; foreign law has to be proved as a matter of fact as to why it differs from Nigerian law.

Given the significance of the subject of choice of law for contractual obligations in private international law, it is surprising that there have not been many reported cases on the subject in Nigeria. Also, there is no comprehensive legislative provision that addresses choice of law issues for contracts in Nigeria,[1] and the subject has received very little academic attention.[2]

Choice of law for contractual obligations is a particularly fascinating area of private international law, as different countries adopt different solutions to the choice of law problem. The European Union's solution was to enact a uniform statute dealing with choice of law for contractual obligations among Member States.[3] The Hague Conference, an international response, has also adopted a set of principles on choice of law in contracts.[4] Given the absence of legislation on choice of law for contracts in Nigeria and the paucity of decided cases in Nigeria, The Hague Principles, Rome Convention, and Rome I Regulation may be useful reference points for the Nigerian legislature to enact a detailed choice of

[1] But see Article VIII of Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment that was ratified by s 73(2) and Schedule V(b) of the Civil Aviation Act (Repeal and Re-enactment) Act 2006 and came into force on 14 November 2006 dealing with issues of choice of law in relation to sale of contracts of aircraft equipment.

[2] See generally G Nnona, 'Choice of Law in International Contracts for the Transfer of Technology: A Critique of the Nigerian Approach' (2000) 44 *Journal of African Law* 78.

[3] Convention on the Law Applicable to Contractual Obligations [1980] OJ L266 ('Rome Convention'); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6 ('Rome I Regulation').

[4] The Hague Principles on Choice of Law in International Commercial Contracts 2015 ('Hague Principles').

law provision for contractual obligations. Pending such legislative intervention, Nigerian judges and arbitrators could also make reference to these international statutes as a guide or gap-filling tool where there are no local statutes or judicial decisions to rely on.[5]

This chapter discusses significant aspects of choice of law for contractual obligations. In areas where there are no local statutes or judicial decisions to rely on, reference is made to international statutes or comparable judicial decisions dealing with choice of law for contractual obligations. Thus, this chapter adopts a positivist, normative, and gap-filling approach.

As a preliminary matter, it is worth noting that a choice of law clause is conceptually different from forum selection clauses.[6] This could be interpreted to mean that the fact that the parties have expressly chosen a forum in which to litigate or arbitrate in their contract, or [in the absence of choosing a forum in their contract] the fact that the parties have invoked the jurisdiction of a court or arbitral tribunal, does not in either case mean that the forum must apply the law of the chosen forum, or *lex fori*. This is a widely accepted principle in private international law.[7] A court dealing with private international law matters would usually address the issue of jurisdiction first before addressing matters relating to choice of law. In some cases, Nigerian judges sometimes make the mistake of confusing concepts of choice of law and choice of forum by treating them as one and the same.[8] This approach is not correct.

Parties may choose a different law and a different forum to govern their contractual relationship. A choice of forum clause in favour of Forum X is not decisive that the parties have chosen the law of that Forum X (assuming the parties do not make a choice of law), and vice versa. Admittedly, there is usually a strong presumption that a choice of forum clause indicates that the law of that forum should apply (assuming the parties do not make a choice of law), and vice versa, on the basis that the chosen forum is in the best position to apply its law.[9] This presumption could be rebutted on the basis that parties that have chosen a particular forum to litigate or arbitrate are in the position to also indicate what law they want to apply to their contractual transaction.

[5] The fourth Preamble to the Hague Principles provides that it could be used by courts or arbitral tribunals. See *Roger Parry v Astral Operations Limited* (2005) (10) BLLR 989 where the South African court was 'guided by' Art 6 of the Rome Convention. It is also useful to note that The Hague Principles, Rome Convention and Rome I Regulation all have excellent legislative commentaries or guides that could be utilised in appropriate circumstances.

[6] See generally *NNPC v Lutin Ltd* (2006) 2 NWLR (Pt. 965) 506, 530–31 (Kalgo JSC); *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530 (Adekeye JSC).

[7] See eg The Hague Principles, art 4.

[8] See eg *MV Panormos Bay v Olam Nigeria Plc* (2004) 5 NWLR 1, 14–15 (Galadima JCA); *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31, 37–38 (Oguntade JCA, as he then was); *LAC v AAN Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA, as she then was); *First Bank of Nigeria Plc* v *Kayode Abraham* (2008) 18 NWLR 172 (with the exception of IT Mohammed JSC as he then was).

[9] See also *Basoroum v Clemessy International* (1999) 12 NWLR 516, 526 (Pats-Acholonu JCA as he then was) approving Brandon J's statement in *The Eleftheria* [1970] 1 Lloyd's Rep 237; *Resolution Trust Corporation v FOB Investment & Property Ltd* (2000) 6 NWLR 246, 260 (Chukwuma-Eneh JCA as he then was).

II. Party Autonomy

Party autonomy is the freedom of the parties to choose the law that governs their contractual obligations. In Nigeria, the general rule 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 that will guide the court in the determination of the parties' rights and obligations, provided that the law is not against Nigeria's public policy and mandatory rules.[10] The advantage of party autonomy, both in judicial and arbitral proceedings, is that it enhances legal certainty, foreseeability and predictability, and reduces transaction costs in the determination of the applicable law. It also enables the parties to choose a law they consider neutral and best suited to their transaction. In doing so, parties minimise the risk that an arbitrator or judge will choose a law that could be considered hostile to the parties' transaction.

Despite the significant advantages of party autonomy in contractual transactions, there are notable drawbacks. The idea that parties, in reality, 'freely' choose which law governs their contractual transactions is not always the case. A party who is in a stronger bargaining position (or is a more dominant party) usually dictates which law governs the contractual transaction. The application of the chosen law may also be one that is contrary to the mandatory or public policy rules of the Nigerian forum,[11] or the law of a foreign country with which the transaction has its closest connection – usually the place of performance.[12]

In addition, the parties may choose a law that has no little or no connection with the parties or their transaction. In *Sonnar (Nig) Ltd v Norwind* ('*Sonnar*'),[13] the plaintiff Nigerian companies sued the defendants for damages for alleged breach of contract for not delivering goods that the parties had agreed would be shipped to Lagos from Bangkok, Thailand on board the 'MV Norwind'. The first defendants were owners of the 'MV Norwind' and carried on business in Germany, the second defendant issued the bill of lading and carried on business in Liberia, and the third defendants were the suppliers/sellers of the goods and carried on business in Thailand. The parties' contract was governed by German law. The defendants entered conditional appearances and challenged the exercise of the Nigerian court's jurisdiction on the basis that the Nigerian court was not the *forum conveniens* to hear the action. Oputa JSC made the following observation on the parties' choice of German law to govern their contract:

> It is also conceded that when the intention of parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention *in general* and as a

[10] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530–31 (Adekeye JSC). See also *Sonnar (Nig) Ltd v Partenreederi MS Norwind* (1987) 4 NWLR 520, 544 (Oputa JSC); *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc* (2006) 19 NWLR 21.

[11] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530–31 (Adekeye JSC).

[12] See also The Hague Principles, art 11(2); Rome I Regulation, art 9(3); *Ralli Bros v Compania Naviera Sota y Aznar* (1920) 2 KB 287; *Foster v Driscoll* (1929) 1 KB 470; *Regazzoni v KC Sethia* [1958] AC 301.

[13] (1987) 4 NWLR 520.

> *general rule* determines the proper law of the contract. But to be effective the choice of law must be *real, genuine, bona fide, legal* and *reasonable*. It should not be capricious and absurd. Choosing German law to govern a contract between a Nigerian shipper and Liberian 'shipowner' is to my mind capricious and unreasonable (emphasis added).
>
> Luckily nowadays a choice of the proper law by the parties is not considered by the Courts as conclusive … the foreign law chosen by the parties as the proper law of the contract must have some relationship to and must be connected with the realities of the contract considered as a whole. In this case the rice was to be supplied from Thailand, the shippers are in Nigeria and the contract was to be performed in Nigeria by delivery of 15,322 bags of parboiled rice to the Plaintiffs in Lagos Nigeria. The Bill of Lading was issued by a Liberian Company. The whole transaction from beginning to end had little or nothing to do with Germany. Why then invoke German law as the proper law of the contract?[14]

Though Oputa JSC's *dictum* in *Sonnar (Nig) Ltd v Norwind*[15] has been cited with approval by other Nigerian appellate judges,[16] the problem with Oputa JSC's *dictum* is that it creates too many exceptions to party autonomy for contractual obligations, so that the general rule on party autonomy is, in reality, an exception.[17] In addition, the long list of factors determining whether a choice of law is genuine, *bona fide*, legal, reasonable, and not capricious and absurd does not appear to contain criteria that are easy for a judge or decision-maker to apply. They are also likely to lead to uncertainty as the criteria are imprecise and a judge or decision-maker could reach different results after applying the same criteria. Another problem with the *dictum* is that it accords the principle of proximity (that is, the closeness of a country or legal system with a particular transaction) a higher value when compared with party autonomy. In other words, it may have been sufficient for Oputa JSC to state that where the transaction has no connection whatsoever with the parties or the legal system chosen by the parties, then the Nigerian court would refuse to apply that law. In *Sonnar*, the first defendant shipowner carried on business in Germany, and that connection was sufficient enough for the parties to choose German law to govern their contract.

Fortunately, in a recent case, Sankey JCA properly stated the law to the effect that:

> 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

[14] *Sonnar (Nig) Ltd v Partenreederi MS Norwind* (1987) 4 NWLR 520, 544.

[15] (1987) 4 NWLR 520.

[16] See *MV Panormos Bay v Olam Nigeria Plc* (2004) 5 NWLR 1, 14–15 (Galadima JCA); *First Bank of Nigeria Plc v Kayode Abraham* (2003) 2 NWLR 31, 37–38 (Oguntade JCA, as he then was); *Lignes Aeriennes Congolaises v Air Atlantic Nigeria Ltd* (2006) 2 NWLR 49, 81 (Ogunbiyi JCA, as she then was). Though in these cases what was in issue was actually choice of forum rather than choice of law.

[17] 'If all or most … cases are to be treated as exceptions to the general rule, there is it seems to me a danger that such exceptions would be so frequent as to undermine the generality of the rule or, to put it another way, that rule will be nearly as much honoured in the breach as in the observance' – Brandon J in *The Makefjell* [1976] 2 Lloyd's Rep 29, 32. Cited with approval by Nnamani JSC in *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR (Pt. 66) 520, 571.

the Court in the determination of their rights, provided the terms are not fraudulent or against public policy.[18]

The following proposals are made in relation to the limitations on party autonomy for contractual obligations in Nigeria. First, Nigerian judges or arbitrators should apply the law that the parties have chosen to govern their contract where the parties involved are both commercial parties or actors in the trade they are involved in.[19] Second, where the transaction is not a commercial transaction in the sense of one party being in a dominant position to dictate the applicable law, Nigerian judges or arbitrators should apply the law governing the transaction between the parties insofar as it would not deprive the weaker party of the law of its habitual residence if that law was the applicable law to the parties' transaction.[20] For the purpose of determining the law that applies to contractual obligations, employment and consumer-related issues should be excluded from the scope of what are regarded as commercial contracts.[21] Third, where the transaction violates the mandatory norms or public policy of the Nigerian forum, Nigerian judges should refuse to apply the law chosen by the parties to the extent to which it violates those mandatory norms or public policy.[22]

Mandatory norms would apply irrespective of the law that the parties choose to govern their contract, or would be the law which applies to the contract when the parties have not chosen a law to govern their contract. Such mandatory norms would usually be embodied in a Nigerian statute and might aim to protect a political and socio-economic value of Nigeria. For example, a Nigerian statute that provides that oil and gas contracts to be performed in Nigeria must be governed by Nigerian law would be a mandatory statute, so that if the parties select another law, it will have no force or effect.

Public policy aims to protect Nigeria's fundamental values. For example, if a foreign company and a Nigerian government official enter into a contract for the foreign company to bribe a Nigerian government official in order to secure an oil licensing contract with Nigeria, such a contract would be deemed illegal by Nigerian law for supporting corruption and would therefore be contrary to Nigerian public policy.

III. Modifying the Choice of Law

The parties may modify or change what law applies to their contract after selecting a choice of law. This is otherwise known as a 'floating choice of law'.

[18] *Beaumont Resources Limited v DWC Drilling Limited* (2017) LPELR-42814 (CA) (Sankey JCA, 49–50).
[19] See also The Hague Principles, art 1(1); Rome I Regulation, art 4.
[20] See Rome I Regulation, arts 6 and 8; The Hague Principles, art 1(1).
[21] See also The Hague Principles, art 1(1); Rome I Regulation, arts 6 and 8.
[22] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 531 (Adekeye JSC).

The international practice is that the parties are free to change at any time which law applies to their contract to the extent that it does not affect the formal validity or the rights of third parties under the contract.[23] The implication of this is two-fold. First, it is the initial law chosen by the parties that always determines the formal validity of the contract (such as mode of offer, acceptance, or whether the contract has to be in writing or deed for it to be effective under a particular law) so that if the parties subsequently change the governing law of the contract, the latter law has no effect in determining the formal validity of the contract. The rationale for this rule is to avoid retroactive invalidation of a contract that was otherwise valid under the law that was initially applicable. Second, where the parties change their choice of law, the latter choice of law should not affect a third party's right (or one who has an interest) under the parties' contract. This rule is significant in various types of loan transactions or credit arrangements where a creditor enters into an agreement with a debtor (which is secured by a guarantor as a third party) to be governed by a particular law. If the creditor and debtor change the law that applies to their loan transaction, such change should not adversely affect the guarantor's liability under the law that was initially chosen by the parties.

In the absence of decided cases on modifying choice of law in Nigeria, the rule may be grounded in the principle of party autonomy – which is part of Nigerian law. In fact, the freedom to modify is inherent in the freedom to choose the applicable law. Furthermore, this rule might be justified on the basis that it meets the commercial expectations of the parties to apply a law consistently in determining their contractual rights and obligations. It is also one that results in legal certainty and meets the sound administration of justice so that a third party should not be put at a disadvantage by the change of law between other parties to a contractual transaction.

IV. Non-State Law

Non-state law refers to law that is not the law of a country or state. A Nigerian court cannot apply non-state law to the parties' transaction unless such non-state law has been incorporated into the Nigerian legal system.[24] The parties may, however, choose to incorporate a non-state law into their contract, which the court would enforce.[25] Where the parties incorporate a non-state law into their contract, the non-state law is actually used to *interpret* the terms of the contract rather than *govern* the contract.[26]

[23] See also The Hague Principles, art 2(3); Rome I Regulation, art 3(2).
[24] *Eagle Super Pack (Nig) Ltd v ACB Plc* (2006) 19 NWLR 21, 47.
[25] ibid, 45, 54.
[26] ibid, 46.

The most instructive case on this subject is the Supreme Court's decision in *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc* ('*Eagle Super Pack*').[27] In *Eagle Super Pack*, the plaintiff-appellant wanted to pay its overseas suppliers, based in Japan, US$16,180 to import raw materials. The plaintiff approached the defendant for the issuance of a letter of credit in favour of the Japanese suppliers. The plaintiff alleged that, despite performing its obligation (such as payment of fees and charges) to the defendant, the defendant failed to issue and transfer the letter of credit to the Japanese company. The plaintiff sued the defendant. The defendant's case was that it merely acted as an agent to the plaintiff for the purpose of getting the letter of credit transferred to the Japanese supplier, and that it did all that was required of it as an agent to carry out that duty. In this regard, the defendant relied on Articles 18 and 19 of the Uniform Customs and Practice for Documentary Credits (the 'UCP').[28] The trial court held in favour of the plaintiff and took the view that the UCP was inapplicable in this case as it was not incorporated into the parties' contract. On appeal to the Court of Appeal, Onalaja JCA, with whom the other Justices of the Court of Appeal unanimously agreed, held that the UCP applied to the parties' contract on the basis that it had gained notoriety, particularly in banking transactions, through its application in Nigerian courts.[29] On appeal to the Supreme Court, the appeal was unanimously allowed.

In relation to the applicability of non-state law in Nigeria, the Supreme Court held that:

> until a convention acquires the force of law by incorporation into the body of laws of this country or is shown to be a custom or usage which has regularly been recognised and upheld by the superior courts in Nigeria as to acquire general acceptance, a party in a civil suit wishing to rely on it must prove its existence, and the fact that the parties have agreed to their contract to let such convention or custom or protocol govern their relationship. A party relying on terms of an international convention must show proof that Nigeria has subscribed to such convention.[30]

The Supreme Court held that in order to make the UCP applicable in a case, the parties ought to specifically incorporate its terms into their contracts. In other words, the parties themselves may incorporate any of the provisions of the UCP into their contract if they are so inclined. Indeed, Article 1 of the UCP recognises the optional nature of the applicability of the UCP. That, however, does not mean the UCP cannot be applicable in Nigeria. The Supreme Court distinguished previous cases where it had applied the UCP to the parties' contract on the basis that, in those cases, the parties had actually incorporated the UCP into

[27] (2006) 19 NWLR 21.

[28] UCP 1983, revision ICC Publication No 400.

[29] *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc* (1995) 2 NWLR (Pt. 379) 590. See also *Vaswani GmbH v Best Stores Ltd*, Suit No LD/424/77 of 31 October 1981 where Onalaja J (as he then was) applied the same approach.

[30] *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc* (2006) 19 NWLR (Pt. 1013) 21, 47.

their contract.[31] In the instant case, there was nothing in the parties' agreement indicating that a particular version of the UCP or the terms of Articles 18 and 20 of the UCP were incorporated into the letter of credit. Therefore, the Court of Appeal was in error to hold that the UCP applied to all transactions relating to letters of credit between a banker and a customer irrespective of whether the parties had incorporated the UCP into their contract.[32]

The Supreme Court also held that the Uniform Customs are intended to regulate many aspects of documentary credit operations. They are promulgated by the International Chamber of Commerce ('ICC') and are made effective by their incorporation into credits by the banks of countries whose banking associations have accepted them. They are not intended to be a code that has the force of law, for the ICC cannot, and does not purport to, legislate. In this respect they are quite different in nature from the many international conventions, such as those on carriage, which have the force of law. In contrast, the Uniform Customs must rely upon contract for their binding effect in each credit contract where they are incorporated. The contractual nature of the Uniform Customs is fundamental to their understanding.

Although the Uniform Customs' coverage is growing more comprehensive with each revision, they do not purport to cover all questions which may arise in connection with credits. The title – Uniform Customs and Practice – gives an indication of their nature. They do not purport to be a code setting out the law relating to and governing credits in, for example, the way that the English Sale of Goods Act 1893, and its successor of 1979, intended to codify, and, in some respects, to change the English common law relating to sale of goods. There are, therefore, considerable areas left for the Nigerian court called upon to decide a dispute.[33]

V. Law Applicable in the Absence of Choice

The parties may fail to make a choice of law for three main reasons. First, the parties or their solicitors may overlook (or fail to appreciate) the significance of making a choice of law to govern their contract. Second, the parties or their solicitors may fail to agree on the choice of law that should govern the parties' contract. Third, the court may render invalid the law chosen by the parties.

Where the parties expressly state in their contract which law should govern their contract, this is usually referred to as an express choice of law. The parties may also make a choice of law not expressed in their contract. This is otherwise

[31] *Akinsanya v United Bank for Africa* (1986) 4 NWLR (Pt. 35) 273; *Nasaralai v Arab Bank* (1986) 4 NWLR (Pt. 36) 409; *Attorney-General Bendel State v UBA* (1986) 4 NWLR (Pt. 37) 547.

[32] *Eagle Super Pack (Nig) Ltd v ACB Plc* (2006) 19 NWLR 20, 40, 45 (Oguntade JSC); 54 (Tobi JSC).

[33] ibid, 46 (Oguntade JSC).

referred to as an implied, inferred, unexpressed, or tacit choice of law. Where the parties do not stipulate which law applies to their contract, it is usually difficult to state whether the court can imply that the parties have made a choice of law, or whether the parties have not made a choice of law at all.[34] The European Union's response to this problem was to apply a strict standard in indicating that a choice of law can only be implied where it is clearly demonstrated with reasonable certainty from the terms of the contract and circumstances of the case.[35] In other words, an implied choice of law must be a real choice. Some factors that may indicate that the parties have made a real choice of law include: a choice of forum clause, a standard form contract such as the Lloyds Marine Insurance in England, a previous course of dealings between the parties indicating that a particular law applies to the contract, an express choice of law in a related transaction, or a reference to particular rules in a statute. In determining an implied choice of law, the most significant factor (though not decisive) appears to be a choice of forum clause.[36] This is because the choice of a forum may be a strong indication that the parties want its law to apply; though such a presumption is rebuttable because parties may choose a different law and forum to govern their contractual transaction.

In determining the applicable law in the absence of choice, the two major approaches the authors identify in the choice of law methodology is the *jurisdictional selecting approach* and the '*better law*' *approach*. The jurisdictional selecting approach is concerned with the law that is most closely connected to the contractual transaction based on the significance of the connections the transaction has with a particular country or legal system. This is also known as the principle of proximity. The jurisdictional selecting approach applies a blind-fold technique, as it is not concerned with whether the law that is most closely connected with the parties' contract does substantive justice to the dispute between the parties. In other words, the jurisdictional selecting technique is not generally concerned with the *content* of the applicable law in determining whether to apply it. If the parties fail to choose a law to govern their contract, and the judge or decision-maker, in determining the law that is most closely connected, discovers that the applicable law to their contract is not suited to the parties' transaction, or invalidates the parties' transaction, a Nigerian judge or decision-maker still must apply it. The jurisdictional selecting approach is also the approach utilised in the European Union choice of law rules and most common law jurisdictions.[37]

[34] See CSA Okoli and GO Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 *Journal of Private International Law* 513, 524–29.

[35] See also Rome I Regulation, art 3(1).

[36] See also recital 11 to Rome I Regulation. This approach is also reflected in the legal systems of some common law and civil law countries alike.

[37] CSA Okoli and GO Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 *Journal of Private International Law* 513; RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 131–48.

The 'better law' approach is concerned with whether a law (in the absence of choice by the parties) applied by the judge or decision-maker results in substantive justice in the contractual transaction between the parties. It applies a result-oriented approach in determining the applicable law to the parties' contract. Thus, if, in the determination of the applicable law before the court, one of the parties proposes a law that does not recognise the concept of undue influence in a contractual transaction while the other party proposes a law that recognises the concept of undue influence in a contractual transaction, a Nigerian judge should apply the law that recognises the concept of undue influence to the parties' contract (irrespective of whether the law that does not recognise the concept of undue influence is more closely connected to the contract) because it produces better justice between the parties.

The advantage the jurisdictional selecting approach has over the better law approach is that it produces more certainty, uniformity, and foreseeability in determining the applicable law in the absence of choice, as the 'better law' approach confers on the judge or decision-maker such a wide discretion that the determination of the applicable law in the absence of choice is usually uncertain. The advantage that the better law approach has over the jurisdictional selecting principle is that it is likely to produce more justice between the parties in determining the applicable law in the absence of choice, since the judge or decision-maker has a large degree of discretion in determining the applicable law to suit the needs of justice.

In Nigeria, Balogun J applied the jurisdictional selecting approach *obiter* in the case of *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd*.[38] In that case, the proposed plaintiff, a company resident in Nigeria, and the proposed defendant, a company resident in England, entered into a contract whereby it was alleged that the proposed plaintiff was to act as the defendant's agent for the sale and delivery of vehicles to buyers in Nigeria in consideration of a 25 per cent commission. There was subsequently a dispute between the parties upon which the proposed plaintiff, at the *ex parte* stage, sought the leave of the State High Court, Lagos to serve the proposed defendant in England. The Court, having satisfied itself that one of the conditions for service outside the Court's jurisdiction was met, as the contract was made within jurisdiction of the court,[39] considered whether it was *forum conveniens* to resolve the matter. It held in the affirmative. The Court held in *obiter* that the proper law that governed the contract was Nigerian law because the breach of contract was committed in Nigeria and the proposed plaintiff was resident in Nigeria, both at the time the contract was made and at the time of breach.

The jurisdictional selecting approach is called the proper law approach in the common law methodology. The proper law approach, which gives considerable

[38] (1977) NCLR 97, 119.
[39] High Court of Lagos State (Civil Procedure) Rules 1973, Order 7 rule 1(e).

significance to the place of performance in determining the applicable law in the absence of choice, was entrenched by Lord Simonds (speaking for the Privy Council), who held that:

> the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion. In the consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by it, it is a factor, and sometimes a decisive one, that a particular place is chosen for performance.[40]

In Nigeria, the judge or decision-maker is usually conferred with some discretion in determining the applicable law in the absence of a choice. There are a wide range of factors a decision-maker could take into account in determining the law that applies to a contract, such as the place of performance, the closeness of one contract to another contract in order to apply a single law, the object of the contract, the place of negotiation and conclusion of the contract, the residence or nationality of the parties to the transaction, the currency of payment, and the language of the contract. The determination of the applicable law usually involves a balancing exercise. This balancing exercise is not a mechanical one that necessarily involves the counting of factors that connect a contract with a country or legal system. In this regard, the judge or decision-maker considers the circumstances as a whole, but gives more weight or significance to factors that are considered crucial in determining the applicable law. The place of performance is usually given considerable significance in determining the law that applies to a contract.[41] This is because the place where the contract is performed is usually most closely connected to the contract and is one of commercial importance to the parties involved in a commercial transaction.

It is proposed that, as a general rule for applying the proper law approach in Nigeria to commercial contracts, Nigerian courts should apply the law of the main place where the professional performs its obligation to the client. The reason for this approach is based on common sense. If the law of the place of obligation of the professional and client are both applied, there would be at least two laws, which could lead to inconsistent solutions, inconvenience for practitioners and decision-makers, and increased transaction costs in investigating the content of different laws. It is thus preferable to apply one law – the law of the place where the professional performs his or her obligation to the client. In this connection, the professional could be a private person and does not have to be officially licensed or regulated by law.

The obligation performed by the professional would be the job of the professional to the client under the contract that defines the contract or gives the contract its name. Thus, for example, the definition of a contract of sale is to sell goods,

[40] *Bonython v Australia* [1951] AC 201, 219–20.
[41] See generally *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97, 119.

so the applicable law is the place where the goods are delivered by the professional (the seller in this case) to the client (the buyer in this case); and the definition of a contract of provision of services is to provide services, so the applicable law is the place where the professional (the service provider in this case) provides services to the client (the recipient of the service in this case).

In the case of complex contracts, where the parties' obligations are mutual, and it is difficult to determine who is the professional, the Nigerian court should apply the law of the place where the party who performs the relatively more important obligation mainly carries out the contract. Thus, in a franchise contract, though the franchisor and franchisee are professionals and perform mutual obligations, it is submitted that the relatively more important obligation is that of the franchisee because the success of the operation of the franchise depends on the franchisee, and thus the law of the place where the franchisee mainly performs the contract should apply. Also, in a distribution contract, though the distributor and grantor (or manufacturer) are professionals, and perform mutual obligations, it is submitted that the relatively more important obligation is that of the distributor because the success of the operation of the distribution contract depends on the distributor, and thus the law of the place where the distributor mainly performs the obligation should apply.

In determining the applicable law, the Nigerian court could also give effect to the intention of the parties as regards their agreement on the place of performance, which could be discovered from the terms of their contract. Where the court cannot determine the place of performance from the terms of the parties' contract, the Nigerian court should apply the law of the place where the contract was mainly performed by the professional, insofar as it is not contrary to the terms of the parties' contract.

As a general rule, in situations where the main place of performance by the professional cannot be determined, resort can be made to the law of the habitual residence of the professional under the contract.

VI. *Dépeçage*

It is usually preferable, in the interest of legal and commercial certainty, for a single law to apply to all aspects of the parties' contractual obligations. This enhances legal and commercial certainty, is convenient for the parties and the court in contractual transactions, reduces transaction costs, and promotes the sound administration of justice. There is little to no legal or commercial value gained in pleading and proving different foreign laws to govern different aspects of a contractual transaction in a Nigerian court.

However, parties to a contract may choose different laws to govern different aspects of their contractual obligations. This is otherwise known as *dépeçage*. The freedom of parties to choose different laws to govern their contractual obligations

is also an aspect of party autonomy.[42] The problem with exercising this autonomy is that the difference in the application of different laws to a contractual transaction could sometimes result in inconsistent results in determining the rights and obligations of the parties. In this regard, where parties choose different laws to govern their contract and it results in inconsistent results, the court should determine which law applies to the parties' contract in the absence of an overall choice.

The judge could also apply different laws to the parties' contract where different parts of the contract appear most closely connected with different countries or legal systems. However, despite the flexibility of this discretion, it could also result in incongruous results in determining the applicable law. Thus, it is a discretion that should only be exercised in truly exceptional circumstances.[43]

VII. Severability

The international practice is that the law that applies to a contract is usually separate from the contract it is contained in, so that a challenge solely based on the validity of the contract does not affect the validity of the choice of law.[44] This is a principle that is actually influenced by the severability of a choice of forum agreement from the agreement it is contained in – a principle accepted in Nigerian conflict of laws. The rationale for the doctrine of severability of a choice of law clause from the contract is based on legal certainty and commercial efficacy. If the parties are allowed to challenge the validity of a choice of law clause solely based on a challenge to the contract the choice of law clause is contained in, considerable time would be wasted and issues of challenge to choice of law clauses would attract litigation. However, a party could challenge the validity of a choice of law clause where the challenge is based on the choice of law clause itself, rather than just a challenge based on the contract it is contained in.

VIII. Validity of a Choice of Law

The validity of a choice of law (which is separate from the contract itself) may arise for consideration in judicial or arbitral proceedings. Such issues include whether the choice of law is formally valid, materially valid, or whether the parties made a choice of law at all.

[42] See also The Hague Principles, art 2(2); Rome I Regulation, art 3(1).

[43] See also C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* ECLI:EU:C:2009:617, at [42], [43], [45], [46], [48] and [49].

[44] The Hague Principles, art 7.

The international practice is that a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.[45] Formal validity includes such matters as whether it should be in writing or witnessed.

The international practice is that the law that purportedly or allegedly governs a contract usually determines the material validity or existence of a choice of law, save that where it would not be reasonable to determine whether a party has consented to a choice of law under the purportedly chosen law, the law of the establishment of such a party determines whether such a party consented to a choice of law.[46] Material validity or existence of a choice of law includes such matters as misrepresentation, fraud, duress, undue influence and mistake.

IX. Mandatory Rules and Public Policy

The applicable law should not be one that is contrary to the mandatory rules or public policy of the Nigerian forum.[47] Mandatory rules refer to what a state considers important or fundamental to its legal system, which cannot be derogated from by any other law. Thus, when Adekeye JSC observed in *JFS Investment Ltd v Brawal Line Ltd*[48] that '[i]n 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',[49] the learned Justice was actually applying the mandatory rules of the Nigerian forum. Another example is Section 11 of the Labour Act,[50] which provides extensive conditions that determine the termination of a contract of an employee. If a Nigerian employee, who habitually carries out work for a multinational oil company's branch office in Nigeria, has his contract governed by a foreign law, and during judicial proceedings it is established that the foreign law does not offer better protection to the Nigerian employee as a weaker party when compared to the Labour Act, the judge or decision-maker should apply Nigerian law to the extent that it protects the Nigerian employee.

Public policy has some similarities with mandatory rules as well. Public policy was defined by the Nigerian Court of Appeal in *Dale Power Systems Plc v Witt & Busch Ltd*[51] as 'community sense and common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare and the like'.[52] In other cases, the Court of Appeal also defined public policy as the 'policy of not sanctioning an act which is against public interest in the sense that it is

[45] See also The Hague Principles, art 5.
[46] See also The Hague Principles, art 5.
[47] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530–31 (Adekeye JSC).
[48] (2010) 18 NWLR 495, 531.
[49] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530 (Adekeye JSC).
[50] Cap 198 LFN 1990.
[51] (2001) 33 WRN 62.
[52] *Dale Power Systems Plc v Witt & Busch Ltd* (2001) 33 WRN 62.

injurious to the public welfare or public good'.[53] Public policy is a vague concept so that it is only applied in truly exceptional situations.[54] Where the chosen law offends the public policy of Nigerian courts, Nigerian courts should not apply the chosen law.[55]

X. Scope of the Chosen Law

The extent of the scope of the chosen law, in reality, depends on how the Nigerian court characterises matters of substance and procedure. In Nigeria, other than the acceptance by the Nigerian Court of Appeal of the principle that the *lex fori* (or law of the forum) governs matters of procedure and the *lex causae* (or applicable, chosen or proper law) governs matter of substance,[56] there is no clear indication as to what governs matters of procedure and substance. In reality, Nigerian judges often apply the *lex fori* in private international law matters of contractual obligation in Nigerian courts, as issues relating to choice of law rarely feature in Nigerian law reports.

The European Union's response to this problem was to indicate matters to which the chosen law should apply.[57] The Hague Principles also did the same thing in indicating matters in relation to which the chosen law should apply.[58]

It is proposed here that the chosen law should govern: the interpretation of the contract; rights and obligations arising from the contract; performance and the consequences of non-performance; the various ways of extinguishing obligations; prescription and limitation periods; validity and the consequences of invalidity of the contract; and pre-contractual obligations. Matters relating to burden of proof, evidence, and presumptions should be left for the Nigerian law (or *lex fori*), as applying the law of another country in this area could prove to be very inconvenient and costly, particularly where the legal system of the Nigerian court and that of a foreign forum apply different approaches in this area of the law.

XI. Conclusion

Choice of law issues in contractual obligations are important in private international law. The freedom of parties to choose the law that governs their contract

[53] *Total Nigeria Plc v Ajayi* (2004) 3 NWLR (Pt. 860) 270, 294; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 92.

[54] See generally *Sonnar (Nig) Ltd v Partenreederi MS Norwind* (1987) 4 NWLR 520.

[55] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530 (Adekeye JSC).

[56] *Resolution Trust Corporation v FOB Investment & Property Ltd* (2001) 6 NWLR 246, 260 (Chukwuma-Eneh JCA).

[57] Rome I Regulation, art 12.

[58] The Hague Principles, art 1.

(subject to certain limitations) is accepted in Nigerian private international law. Given the significance of the subject of choice of law in contractual obligations, it is hoped that the Nigerian legislature will codify it. The Hague Principles, Rome Convention, and Rome I Regulation could be a good starting point to draft Nigeria's choice of law in contractual obligations. Pending such codification, it is hoped that when Nigerian judges are confronted with matters of choice of law in contractual obligations, they will make reference to international instruments such as The Hague Principles, Rome Convention, and Rome I Regulation as a guide in reaching their decision, where there are no local statutes or judicial decisions to rely on.

9

Torts

I. Introduction

The law that applies to a tort is of considerable legal and commercial significance in inter-State and international legal claims. Unlike commercial transactions, in most cases, parties are very unlikely to make a choice of law to govern matters of tort in cross-border transactions. Party autonomy is hardly ever utilised in tort situations because, in the ordinary course of events, parties do not prepare agreements to govern their tort disputes. In the same vein, whenever a tort occurs, the likelihood of parties agreeing on a law that will govern their relationship is rare because the tortfeasor will be interested in a law that limits his or her liability and the compensation he or she should pay, as opposed to a law that benefits the victim's interests. Thus, the determination of the applicable law for torts (in the absence of prior choice) may be easily thrown up in cross-border transactions, both in inter-State and international situations.

As a preliminary matter, it should be highlighted that jurisdiction and choice of law are conceptually different in private international law. Although they are different concepts, Nigerian courts sometimes confuse or muddle the issue of choice of law with that of choice of court and vice versa.[1] The law that governs a tort is separate from the issue of which court should determine a particular tort dispute in cross-border transactions. In this regard, a successful challenge by a party that another law should govern the tort dispute between the parties should not automatically lead to the Nigerian court refusing to assume jurisdiction as has occurred in some reported cases.[2] In other words, once a Nigerian court rightly assumes jurisdiction under the law (such as the Constitution, statute, or common law), a challenge to the *choice of law* by a party does not amount to a challenge to the *jurisdiction* of the Nigerian court.

There are two distinct situations at the jurisdiction phase where the applicable law for tort may become a relevant consideration. First, where the court is considering whether to grant leave to serve a writ out of the jurisdiction. In this situation,

[1] See generally the cases of *Amanambu v Okafor* (1966) 1 All NLR 205; *Benson v Ashiru* (1967) 1 All NLR 184; *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 1; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 1070) 109; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 640) 99.

[2] See eg *Amanambu v Okafor* (1966) 1 All NLR 205.

if the tort is committed in Nigeria, then it is one of the grounds on which leave may be granted. Also, regardless of where the tort is committed, it is simply one of the factors the court will take into account in deciding whether Nigeria is the *forum conveniens*. The second situation is where a party makes an application for a stay of proceedings. Here, the applicable law of tort is one of the many factors the court should consider in its *forum non conveniens* analysis.

The distinction between jurisdiction and choice of law is one of the most widely accepted principles in private international law. It also has the practical significance of aiding the sound administration of justice in cross-border transactions, whereby a Nigerian court can determine which law applies to the tort dispute, without allowing such considerations to automatically affect the determination of whether the court should assume jurisdiction (under the Constitution, statute, or common law) or exercise or decline jurisdiction (on the basis of *forum non conveniens*). It is thus important for Nigerian courts to maintain this distinction in claims that are adjudicated before them.

This chapter discusses the choice of law methodology for torts and various approaches to determining the applicable law for torts in Nigeria.[3] Given the gaps in the current state of Nigerian law, this chapter draws on comparative jurisprudence from English, American and European law, as well as the laws of sister Commonwealth African countries to make proposals for judicial and legislative reforms.

II. Choice of Law Methodology: Comparative Analysis

Choice of law in torts usually presents difficult questions due to the policy choices that are involved in determining which law applies to a tort in cross-border transactions. These policy choices include: reconciling the requirements of legal certainty, predictability, and uniformity with those of flexibility and justice in individual cases, globalisation, party expectations, convenience and simplicity, the sound administration of justice, reducing 'forum shopping', and reconciling the interests of the tortfeasor with that of the victim of the tort. These policy choices also arise due to the variety of connecting factors involved in a choice-of-law process for torts. Such connecting factors include: the forum where the action is instituted, the nationality of the parties, the residence and domicile of the parties, the place where the damage took place, the place giving rise to the damage in the tort, the

[3] See generally IO Agbede, 'Conflict of Tort Laws in Nigeria: An Analysis of the Rule in *Benson v Ashiru*' (1972) 6 *Nigerian Law Journal* 103; IO Agbede, 'Conflict of Tort Laws under the Received English Law in Common Law Africa: A Review' (1971) 3 *Zambia Law Journal* 64; HA Olaniyan, 'Choice of Law in the Nigerian Interstate Conflict of Torts Law: Much Ado About Nothing' (2012) 2 *NIALS Journal of Law and Public Policy*, 63; TC Williams, 'The American and European Revolutions on Choice of Law in Torts with Foreign Element: Case Studies for the Practice of Conflict of Laws in Nigeria' (2015) 2 *International Journal of Humanities and Cultural Studies* 642.

place where the damage manifests itself, and the pre-existing relationship between the parties.

The varied policy choices involved in the choice of law process for torts have provoked courts, legislators, and scholars in various parts of the world (particularly in Europe and America) to advance various approaches to the choice of law problem. Some of these approaches are discussed here.

A. *Lex Fori*

Lex fori is used here to refer to the application of the law of the forum as a choice of law rule. This is conceptually different from a situation where the application of a choice of law rule results in the applicable or governing law ('*lex causae*') being the *lex fori*. For example, the Nigerian choice of law rule for torts is the *lex loci delicti* (or place where the tort occurred).[4] Thus, in an international situation where a tort takes place in Nigeria, the choice of law rule results in Nigerian law being applied as the *lex causae* – the application of Nigerian law arises from applying the *lex loci delicti* as a choice of law rule rather than the *lex fori*. On the other hand, where a tort takes place in Mexico, the *lex causae* in this case is Mexico because it is the *lex loci delicti*, but the *lex fori* is Nigerian law.

The *lex fori* is one of the approaches that can be used in determining the applicable law. When England applied its common law rules, English courts, in applying the so-called 'double actionability rule', gave the *lex fori* a predominant role, in the sense that a plaintiff could not successfully rely on the *lex loci delicti* if the tort was not unlawful according to English law.[5] In the United States, during the period between 1900–1950, the *lex fori* played a major role in the choice of law technique as advocated by some US scholars and applied by some US courts.

In Nigeria, the *lex fori* is not the approach taken by the Nigerian courts as a choice of law rule. However, in respect of international situations where proof of foreign law is required (as distinct from inter-State situations),[6] the law of the forum also automatically applies by default where foreign law cannot be proved, or it cannot be established that foreign law is different from Nigerian law.

The application of the *lex fori* has also been justified on the basis that, where parties submit to the jurisdiction of the forum, they should also be willing to

[4] See generally *Amanambu v Okafor* (1966) 1 All NLR 205; *Benson v Ashiru* (1967) 1 All NLR 184; *Agunanne v Nigerian Tobacco Company Ltd* (1979) 2 FNLR 13; *Agunanne v Nigerian Tobacco Company Ltd* (1995) 5 NWLR (Pt. 397) 541.

[5] *Boys v Chaplin* [1971] AC 356, 385 (Lord Wilberforce), 406 (Lord Pearson). *Cf Red Sea Insurance Company Ltd v Bouygues SA* [1995] 1 AC 190.

[6] Evidence Act 2011 s 122(2). See *Benson v Ashiru* (1967) 1 All NLR 184; *Agunanne v Nigeria Tobacco Company Ltd* (1979) 2 FNLR 13; *Abcos (Nig) Ltd v Kango Wolf Power Tools Ltd* (1987) 4 NWLR (Pt. 67) 894, 900; *Peenok Ltd v Hotel Presidential Ltd* (1982) 12 SC 1; *Eagle Super Pack (Nig) Ltd v ACB Plc* (2006) 19 NWLR (Pt. 1013) 20, 46–47; *Tulip (Nig) Ltd v NTM SAS* (2011) 4 NWLR 254, 277; *Wema Bank Plc v Linton Industrial Trading Nigeria Ltd* (2011) 6 NWLR 479, 506.

submit to the application of the law of the forum.[7] The *lex fori* has the practical advantage of familiarity, convenience, and ease of application. A Nigerian court is in the best position to know and apply Nigerian law, as opposed to foreign law, so that a Nigerian judge can obviate the inconvenience, time, and costs that the parties and the courts expend on proving foreign law. Also, the application of Nigerian law enhances the sound administration of justice, as a Nigerian court, in reality, may not correctly apply foreign law even with the aid of expert evidence when compared to the accuracy with which a foreign court would apply its own law.

The disadvantage of applying the *lex fori* as a choice of law rule is that it is a parochial approach, since it exclusively advances the interests of the forum. It is also an approach that encourages 'forum shopping' on the basis that a victim of a tort would likely select a forum in which to sue the tortfeasor where it can obtain a favourable remedy (by the application of the law of the said forum). Private international law responds to the needs of globalisation and the interaction between different legal systems.[8] This requires that in some situations, a Nigerian court should be willing to apply foreign law to the parties' dispute, depending on the circumstances of the case.

B. Double Actionability

Nigerian courts apply the double actionability rule as a choice of *jurisdiction* rule rather than a choice of *law* rule.[9] However, although English judges who created the 'double actionability rule' apply it as a choice of law rule,[10] there was some confusion as to whether it is a choice of law rule or a choice of jurisdiction rule.

The double actionability rule has its roots in the old English case of *Phillips v Eyre*.[11] In *Phillips v Eyre*, the plaintiff, *inter alia*, sued the defendant in the English court for trespass to person (false imprisonment and assault and battery) committed in Jamaica. The defendant was the Governor of Jamaica. The defendant, in his defence, relied on retrospective legislation passed in Jamaica that gave legal justification to the tort committed by the defendant. Willes J (with whom other judges in the case concurred) created the rule by stating that:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England …

[7] *Boys v Chaplin* [1971] AC 356, 380 (Lord Hodson).

[8] RF Oppong, 'Globalization and Private International Law in Commonwealth Africa' (2014) 36 *University of Arkansas at Little Rock Law Review* 153–60.

[9] *Benson v Ashiru* (1967) 1 All NLR 184; *AO Ubanwa v C Afocha* (1974) 4 ECSLR 308; *Ajakaiye v Adedeji* (1990) 7 NWLR 192; *Herb v Devimco International* (2001) 52 WRN 19; *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR 109.

[10] *Red Sea Insurance Company Ltd v Bouygues SA* [1995] 1 AC 190.

[11] (1870) LR 6 QB 1.

> Secondly, the act must not have been justifiable by the law of the place where it was done.[12]

It has been a matter of controversy whether *Phillips v Eyre* is a choice of law rule or choice of jurisdiction rule.[13] Indeed, in the latter case of *Boys v Chaplin*,[14] Lord Hodson, in his leading judgment, was of the view that 'Willes J. was not, however, concerned with choice of law but only with whether the courts of … [England] should entertain the action.'[15] However, as stated earlier, English judges, in applying their common law rules, applied the rule in *Phillips v Eyre* as a choice of law rule. Other Commonwealth jurisdictions such as Australia and Canada, at a time when they applied *Phillips v Eyre*, also interpreted it as a choice of law rule. However, some Commonwealth African courts (such as Ghana and Kenya) apply the rule in *Phillips v Eyre* as a choice of jurisdiction rule rather than a choice of law rule.[16] This position is the situation in Nigeria.

The double actionability rule is now regarded as an outdated and anachronistic approach to the choice of law problem for torts, so that it is recommended that Nigerian courts should not even apply it as a choice of law rule. The rule was also discarded in the United Kingdom.[17]

The double actionability rule has the disadvantage of giving the victim of a tort the worst of both positions from the *lex fori* and *lex loci delicti*, so that a plaintiff cannot be successful if any of these laws justifies the conduct of the tortfeasor. The rule also advances the interest of the forum in the sense that where a tort is unlawful according to the *locus delicti* (the 'place of the tort'), but justified by the law of the forum, the plaintiff cannot successfully claim under the *lex loci delicti*. This is an important point. Indeed, one can notice the colonial origins of the rule. It was structured to protect English interests – to avoid a situation where Englishmen, such as the Governor in *Phillips v Eyre*, could be punished for acts which are not unlawful in England.[18]

C. Inflexible *Lex Loci Delicti*

The *lex loci delicti* (the 'law of the place where the tort occurred') is the approach applied by Nigerian courts. Nigerian courts apply the *lex loci delicti* rule as a strict or inflexible choice of law rule without any exception; to date, no known exception to the *lex loci delicti* has been advanced in the existing Nigerian jurisprudence.

[12] *Phillips v Eyre* (1870) LR 6 QB 1, 28.

[13] *Boys v Chaplin* [1971] AC 356, 375 (Lord Hodson); 385–87 (Lord Wilberforce).

[14] [1971] AC 356.

[15] ibid, 375 (Lord Hodson).

[16] See the Ghanaian case of *Watcher v Harlley* (1968) GLR 1069. See the Kenyan cases of *Riddlebarger v Robson* (1958) EA 375, and *Rage Mohammed Ali v Abdullahim* (2005) eKLR.

[17] Private International Law (Miscellaneous Provisions) Act 1995 s 10.

[18] The appropriate domestic interest may be taken care of with the public policy exclusionary rule.

Applying the *lex loci delicti* as an inflexible choice of law rule has the advantage of increasing legal certainty, predictability, and uniformity in determining the applicable law so that where a tort occurs in cross-border transactions, the parties to the dispute can reasonably predict that the law of the place where the tort took place will apply. In this connection, the High Court of Australia justified the *lex loci delicti* as an inflexible choice of law rule on the basis that:

> Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing a flexible rule in terms such as 'real and substantial' or 'most significant' connection with the jurisdiction will not give sufficient guidance to courts, to parties or to those, like insurers, who must order their affairs on the basis of predictions about the future application of the rule. Whatever may be the advantages of a flexible rule or a flexible exception to a universal rule in the case of international torts, the practical disadvantages are such that neither approach should be adopted with respect to Australian courts which invoke interstate element.[19]

The Australian Supreme Court also held that:

> The selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of certainty of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the *lex causae* engenders doubt as to liability and impedes settlement.[20]

In addition, applying the *lex loci delicti* as an inflexible rule enhances the aims of uniformity and globalisation in the interaction between legal systems and reduces 'forum shopping' in the sense that if the law of the country where the tort occurred is applied in all countries, the plaintiff expects that whichever forum it sues in would always apply the law of the place where the tort occurred.

The main disadvantage of the *lex loci delicti* rule is that sometimes it does not serve the needs of justice in individual cases, since it is a rigid approach. This is what influenced the New York Court of Appeals in *Babcock v Jackson*,[21] and the then House of Lords in *Boys v Chaplin*,[22] to refuse to apply the *lex loci delicti*. These courts were rightly of the view that the place of the tort may be fortuitous in the sense that the parties to the dispute may have a pre-existing relationship and may be on a short stay in the country or federal State where the tort took place; in such a situation a flexible approach should allow the law that has a very close relationship to the parties to apply. Thus, in *Babcock v Jackson*,[23] the plaintiff and defendant were both residents of New York, United States. The plaintiff was a gratuitous passenger in the defendant's car on a trip to Ontario being in Canada. The trip

[19] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 538, approved in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 517.

[20] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 517.

[21] 12 N.Y.2d 473 (NY 1963), [1963] 2 Lloyd's Rep 286 (USA).

[22] [1971] AC 356.

[23] 12 N.Y.2d 473 (NY 1963), [1963] 2 Lloyd's Rep 286 (USA).

began in New York State where the car was licensed, insured and usually garaged. An Ontario statute absolves drivers from liability towards gratuitous passengers, whereas New York law contains no similar provision. The New York Court applied the law of New York instead of the law of Ontario (the *lex loci delicti*) to meet the justice of the case between the parties, who had a pre-existing relationship.

Similarly, in *Boys v Chaplin*,[24] the plaintiff-respondent sustained serious injuries in a road accident in Malta caused by the admitted negligence of the defendant-appellant. Both parties were normally resident in England, but were stationed in Malta at the material time as part of the Armed Forces. The plaintiff-respondent brought an action in England, the only issue being whether the damages were to be assessed according to the law of Malta, where he could have sued the defendant-appellant but would have recovered only special damages (namely for financial loss), agreed to be £53. However, he would not have been able to recover general damages for pain and suffering, as was the position under English law. The then House of Lords was persuaded by the reasoning of the New York Court of Appeals in *Babcock v Jackson* and refused to apply the *lex loci delicti* (arising from the double actionability rule) in order to meet the justice of the case. The House of Lords applied English law as the governing law applicable to all the heads of damages.

Also, in the Australian case of *Neilson v Overseas Projects Corporation*,[25] all the parties to the dispute were Australian. The only connection between the dispute and China was the place of occurrence of the tort.[26] If Chinese law, which was the *lex loci delicti*, applied, the claimant would have been deprived of her claim since the action was barred by a Chinese statute of limitation. The Australian Supreme Court by a majority applied *renvoi* by holding that Chinese law, when applied to the facts, would look to Australian law, including Australian limitation periods, to determine the parties' rights and obligations. It is submitted that this innovative use of *renvoi* would have been unnecessary if the Australian Supreme Court had overruled its rigid choice of law rule of *lex loci delicti* and applied a more flexible approach that took into account the expectations of the parties, such as, in this case, the common nationality of the parties.

D. Governmental Interest Analysis

Brainerd Currie is credited with formulating the theory of the governmental interest analysis.[27] He was of the view that a state had an 'interest' in the application of its laws so that if the *lex fori* had no legitimate interest in the application of its own law, it should be willing to apply foreign law to the parties' dispute if the foreign law had a legitimate interest in the parties' dispute. In summation, his theory was

[24] [1971] AC 356.
[25] [2005] HCA 54.
[26] *Neilson v Overseas Projects Corporation* (2005) HCA 54, [127] (Gummow and Hayne JJ).
[27] B Currie, *Selected Essays on the Conflict of Laws* (Durham NC, Duke University Press, 1963).

that the law of the place which has the most dominant interest or contact with a dispute should govern a tort. His theory focused on looking into the substance of the law and construing the policy behind a law, in order to ascertain whether the law of the forum should defer to foreign law, which might have a competing interest in the application of its law.

The theory, though controversial, later influenced the thinking of many American judges. Flud J, delivering a judgment in the New York Court of Appeals in *Babcock v Jackson* (in which a majority of the judges concurred), held that:

> The 'centre of gravity' or 'grouping of contacts' doctrine adopted by this court in conflict cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-State contacts. Justice, fairness and 'the best practical result' … may best be achieved by giving controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation … the relative importance of the relationships or contacts of the respective jurisdictions is to be evaluated in the light of 'the issues, the character of the tort and the relevant purposes of the tort rules involved.'[28]

In this regard, Flud J concluded that:

> there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling, but the disposition if other issues must turn, as does the issue of standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of a particular issue presented.[29]

Currie's theory of the 'governmental interest analysis' is quite useful for the purpose of doing justice in individual cases, where the judge can apply his or her discretion to determine which legal system has the most dominant contact to the parties' relationship. However, the problem with the approach is that it is sometimes difficult to apply, and thus results in uncertainty. American judges sometimes reach conflicting decisions by applying the governmental interest analysis. Also, the governmental interest could also be used as a pretext to apply the law of the forum as the applicable law.[30]

E. Proper Law of Tort

John Morris, in an interesting article, proposed that the proper law of tort should apply to govern the relationship between the parties.[31] His theory was inspired by

[28] *Babcock v Jackson* 12 N.Y.2d 473 (NY 1963), [1963] 2 Lloyd's Rep 286, 289.
[29] *Babcock v Jackson* 12 N.Y.2d 473 (NY 1963), [1963] 2 Lloyd's Rep 286, 291.
[30] FK Juenger, 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 *American Journal of Comparative Law* 1, 10–50.
[31] JHC Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 881.

an analogy with the proper law of contract applied by English courts at the time. His formulation was that the proper law of tort was the law that had the most significant relationship to the parties' dispute or issues in a given case. He was of the view that the *lex loci delicti* rule was too rigid, could cause hardship in individual cases, and the court should pay attention to all the connecting factors involved in the case before reaching a decision on the proper law of the tort.

Morris' proposition has the advantage of flexibility, for the judge can apply his or her discretion in a given case to determine which law had the most significant relationship to the parties' dispute rather than applying the choice of law process rigidly or mechanically, such as the inflexible *lex loci delicti* rule. The main disadvantage of the theory is that it would likely result in uncertainty if the proper law of tort was to be applied as a general rule.[32] In addition, the proper of law of the tort is premised on a dubious analogy in the sense of applying the choice of law approach for contracts, to torts; unlike in the case of torts, parties usually *choose* the law that governs their contractual obligations.[33] These were some of the reasons why the House of Lords in *Boys v Chaplin* declined to apply the proper law of tort as advanced by Morris.

However, the proposition of Morris would later gain significance when the United Kingdom drafted its statutory choice of law rules for torts.[34] Under the then United Kingdom statutory rules for choice of law in torts, the *lex loci delicti* was applied as a general rule, with an 'escape clause' provided for the judge to apply the law that has the most significant relationship to the parties' dispute.[35] The proper law of tort was to be used in this sense as an exception rather than the rule.

F. 'Material and Substantive Justice' Principles/'Better Law' Approach

The doctrine of the 'better law' approach was formulated by David Cavers.[36] He observed that 'the court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?'[37]

Cavers was highly critical of the approach of determining the applicable law by simply choosing the law of a country, State or territory. He classified this approach as a 'jurisdictional selecting rule'. He submitted that the applicable law should not be determined without investigating the content of the law itself. In other words, it is not enough to apply a choice of law rule that results in the determination of a

[32] *Boys v Chaplin* [1971] AC 356, 377–78 (Lord Hodson), 383 (Lord Guest), 391 (Lord Wilberforce).
[33] *Boys v Chaplin* [1971] AC 356, 377–78 (Lord Hodson).
[34] Private International Law (Miscellaneous Provisions) Act 1995.
[35] Private International Law (Miscellaneous Provisions) Act 1995 ss 11 and 12.
[36] DF Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 *Harvard Law Review* 173, 194.
[37] ibid, 189.

particular law, without looking into the effect that law would have on the parties' dispute. He regarded the approach of determining the applicable law without investigating the content of the law as a 'blindfold technique'. He was of the view that the choice of law process should be concerned with whether the applicable law results in material or substantive justice between the parties. This is otherwise referred to as the 'better law approach'.[38] Thus, in a given case where a particular law denies the victim of the tort a remedy, while another law provides the victim with a remedy, the choice of law process should be such that applies the 'better law' which provides the victim with a remedy. This approach is applied by some American courts.[39]

In reality, the better law approach could also be applied in favour of the law of the forum through the public policy exception; though resorting to the concept of public policy is a more extreme measure.

The advantage of the better law approach is that it advances the cause of justice, particularly for the victim of a tort. The better law approach is not a mechanical approach that avoids looking into the content of the applicable law in determining the parties' dispute. The principal disadvantage of the better law approach is that it leads to uncertainty and often attracts litigation and 'forum shopping' by the victim of a tort. The determination of what law produces material or substantial justice is also a relative concept, so that judges may find it difficult to agree on what law produces material or substantial justice for the parties to the dispute. The approach has also been criticised for punishing the tortfeasor in cross-border transactions, since the victim of the tort is frequently given the option of relying on a law that offers a more favourable outcome. In other words, the better law approach equates the role of tort to that of criminal law, which is retributive, rather than taking a 'loss-distribution approach' to the law of tort, where the victim of the tort is simply being given a remedy for the damage caused by the tortfeasor.[40]

In the European Union choice of law rules, the European legislators rejected the attempt to insert the better law approach into their choice of law rules for torts.[41] Also, in a related case, the Court of Justice of the European Union rejected an attempt to apply the better law approach for the protection of employees, which are regarded as weaker parties in relation to their employers.[42] Again, the rationale for the European approach is that the better law approach results in uncertainty and increased litigation and forum shopping, and is not consistent with its aims of uniformity and legal certainty in its choice of law process.

[38] RA Leflar, 'Conflicts Law: More on Choice-Influencing Considerations' (1966) 54 *California Law Review* 1584.

[39] SC Symeonides, 'Choice of Law in Cross Border Torts: Why Plaintiffs Win and Should' (2009) 61 *Hastings Law Journal* 337–41.

[40] SC Symeonides, 'Choice of Law in Cross Border Torts: Why Plaintiffs Win and Should' (2009) 61 *Hastings Law Journal* 337–41.

[41] See generally A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Oxford, Oxford University Press, 2008).

[42] Case C-64/12 *Schlecker v Boedeker*, 12 September 2013, ECLI:EU:C:2013:551.

G. The European Union Approach

The European Union choice of law rules for tort are governed by the Rome II Regulation. The Rome II Regulation is a harmonisation of the choice of law rules for Member States of the European Union for torts.

Article 4(1) of Rome II provides, as a general rule, that the law that applies to a tort/delict is the law of the place where the damage occurs, irrespective of the place that gives rise to the damage and where the indirect consequences of the event occur.[43] Article 4(2) provides (as an exception) that where the parties are habitually resident in the same country at the time the tort occurs, the law of their common habitual residence will be the applicable law. Article 4(3) (as an 'escape clause') provides that where 'it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply'. It also provides that a 'manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.[44]

The escape clause in Rome II honours the claim that the law of the place of injury and of the place of common habitual residence in Articles 4(1) and 4(2) are not exhaustive solutions to the law applicable to non-contractual obligations. The wording of the escape clause in Article 4(3) is intended to produce some degree of flexibility in Rome II. However, the use of the phrases 'clear from all the circumstances of the case' and 'manifestly closer connection' indicates that it is to operate only in an exceptional manner.

In addition, Rome II has detailed provisions dealing with particular tort situations such as product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, unjust enrichment, *negotiorum gestio*, and *culpa in contrahendo*.[45]

Though Rome II aims at reconciling the requirements of legal certainty and flexibility, Rome II tilts more towards certainty than flexibility.[46] The advantage the European choice of law approach has is that parties can reasonably predict what law governs their torts, and Member State courts still have a margin of discretion to do justice in individual cases.

However, Rome II has been criticised for not being flexible enough on three main grounds.[47] First, the exception to the law of the place of damage (as a general rule) only provides for the law of the common habitual residence of the parties to

[43] See also Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations ('Rome II') recitals 17 and 18.

[44] Other escapes are provided in Rome II arts 5(2), 10(4), 11(4) and 12(2)(c).

[45] Rome II arts 5–12.

[46] CSA Okoli and GO Arishe, 'The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation' (2012) 8 *Journal of Private International Law* 513, 535–45.

[47] See SC Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173.

apply. In other words, other exceptions such as the law of the common nationality of the parties could have been utilised as an exception to that of the place of damage. Second, the escape clause does not take into account a better law approach or substantive justice principles. Third, Rome II does not expressly allow the splitting of the applicable law.

III. Nigerian Case Law on Choice of Law in Torts

In Nigeria, the inflexible *lex loci delicti* rule is applied as a choice of law rule for torts, while the double actionability rule is applied as a choice of jurisdiction rule. In some of the cases, it is unclear if Nigerian judges appreciate the significance of the choice of law issues. Some Nigerian judges have also failed to appreciate the conceptual distinction between choice of law and choice of court.

The first reported case of the Supreme Court dealing with choice of law for torts is *Amanambu v Okafor* ('*Okafor*').[48] In *Okafor*, the widow of a man killed on the roads in the North sued the driver and owner of the vehicle, a resident of Onitsha, in the High Court, Eastern Region for 'damages under the Fatal Accidents Law, Northern Region, 1956'. Upon the defendants objecting to the jurisdiction of the court, the plaintiff obtained an order to amend the claim to read that it was brought under the 'Fatal Accidents Law, Eastern Nigeria, 1956.' The case came up for trial before another judge, before whom the defendants objected that the order to amend was invalid since the claim had been brought under the Law of the Northern Region; he ruled that the order was a nullity and that the court had no jurisdiction over the claim as originally brought. On appeal, the plaintiff insisted that she could found her claim on the law of the Eastern Region. The Supreme Court held that the order to amend, which had been made in the presence of both parties, was not a nullity and could not be reviewed by another judge; and the claim stood as amended as a claim founded on the *Fatal Accidents Law of Eastern Nigeria*. On the issue of the applicable law, the Supreme Court held that:

> In our view that Law of Eastern Nigeria confers a right to sue for compensation in respect of a fatal accident which occurred in Eastern Nigeria and not outside it: for the Legislature of Eastern Nigeria could only legislate for compensation in regard to such an accident. Therefore, the claim, which is based on the Fatal Accidents Law, Eastern Nigeria, cannot stand, and the appeal must be dismissed.
>
> Had the claim as originally based on the Fatal Accidents Law, Northern Nigeria, been left unamended, then we would have had the opportunity of considering whether it could have been brought in the High Court of Eastern Nigeria, and of going into questions of private international law and the possibility of enforcing in Eastern Nigeria a claim founded on a fatal accident in Northern Nigeria in respect of which compensation was being claimed under the Fatal Accidents Law, Northern Nigeria. But we cannot

[48] (1966) 1 All NLR 205.

> do that in the present case: for here the plaintiff insists that he can found his claim on the Fatal Accidents Law, Eastern Nigeria, and with that we cannot agree.[49]

In holding that the law of Northern Nigeria must be the applicable law rather than the law of Eastern Nigeria, the Supreme Court was, in essence, applying the inflexible *lex loci delicti* rule as a choice of law rule in an inter-State scenario. The application of the inflexible *lex loci delicti* rule appears to have been influenced by the view that a law must only apply within its territorial scope (and not outside of it) in cross-border transactions.[50]

However, it is not clear if the Supreme Court fully appreciated the choice of law problem engaged in this case. First, the Supreme Court, in this case, appears to have confused or muddled up choice of law with choice of jurisdiction. A challenge to a choice of law is also conceptually different from a challenge to a choice of jurisdiction. In this regard, the Supreme Court held that the plaintiff had no cause of action because it sued under a *wrong* choice of law in an inter-State situation. The Supreme Court should not have dismissed the case having held that the order to amend the applicable law was done properly. What the Supreme Court might have done was to direct that the law of Northern Nigeria be utilised as the governing law for the parties in this dispute. The approach taken by the Supreme Court in dismissing the case did not aid the sound administration of justice.

Second, the plaintiff suing in the State of residence of the defendant sufficed for the court of Eastern Nigeria to assume jurisdiction in this case. The defendant (in the absence of challenging the substantive power of the court to assume jurisdiction) in this case could only challenge the exercise of the court's jurisdiction on the basis of *forum non conveniens*. The Supreme Court may have considered whether the then Eastern Nigeria was a convenient forum to hear the dispute in view, *inter alia*, of the fact that the accident took place in Northern Nigeria and the applicable law was that of Northern Nigeria. In essence, the Supreme Court simply may have utilised the applicable law as one of the factors to be taken into account on whether the Court of Eastern Nigeria could exercise jurisdiction in this case.

In *Benson v Ashiru* ('*Ashiru*'),[51] the plaintiff-respondent sued on his own behalf. Also, the dependent relatives of the deceased, whom he described as his wife, sued the defendant-appellants in the High Court of Lagos under the 'Fatal Accidents Act, 1846' (of England) for the recovery of damages representing loss sustained by her death through the negligent driving of the second defendant in the then Western Nigeria.

The trial judge held that the plaintiff had proved that the death of the deceased was caused by the negligence of the second defendant, and this decision was not challenged on appeal. He also held that the plaintiff had failed to prove that he was

[49] *Amanambu v Okafor* (1966) 1 All NLR 205, 207.
[50] *Cf Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 1; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt. 640) 99.
[51] (1967) NMLR 363.

married to the deceased, and awarded damages only for the benefit of the children and the deceased's parents, as well as for funeral expenses.

On appeal, it was contended that since the accident occurred in the then Western Nigeria, the law applicable was the 'Torts Law of Western Nigeria' and not the 'Fatal Accidents Act, 1846'. The appeal court relied on the Supreme Court's decision in *Okafor*. In reply, counsel for the respondent asked leave to amend the statement of claim by deleting 'under the Fatal Accidents Act, 1846.'

The Supreme Court rejected this argument of the defendant-appellants, and without overruling *Okafor*, Brett JSC, speaking for the Supreme Court held that:

> The rules of the Common Law of England on questions of private international law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria: two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly it must not have been justifiable by the law of the part of Nigeria where it was done: *Philips v Eyre*. These conditions are fulfilled in the present case.[52]

The Supreme Court was, in essence, applying the double actionability rule in *Phillips v Eyre* as a choice of jurisdiction rule, rather than a choice of law rule. The Supreme Court also declined to go into the question of whether the applicable law was the 'Torts Law of Western Nigeria' and not the 'Fatal Accidents Act 1846' as the content of both laws was substantially the same, save that funeral expenses were recoverable under the 'Torts Law of Western Nigeria' and not the 'Fatal Accidents Act 1846.'

In this regard, *Okafor* and the later decision of *Ashiru* may be reconciled on the basis that the Supreme Court, in the latter case, was not overruling the application of the inflexible *lex loci delicti* rule as a choice of law approach, but simply applied the double actionability rule as a choice of jurisdiction rule for tort situations. In addition, counsel for the plaintiff in *Ashiru* was guided by the decision in *Okafor* by amending the applicable law to that of the *lex loci delicti*, as distinct from the counsel for the plaintiff in *Okafor*, who insisted on the application of the *lex fori*.

In *Agunanne v Nigerian Tobacco Company Ltd*,[53] the plaintiff, who was, at all material times, an employee of the defendant, claimed general damages in respect of injuries he sustained in a motor accident involving a car driven by the defendant's driver. The accident occurred in Benue State, and the action was instituted before the High Court of Anambra State. In determining the question of the applicable law, Iguh J (as he then was) held that:

> Upon a careful consideration of all the relevant authorities on this matter, it appears clear to me that where, as in this case, an accident happened in a foreign State and an action is properly instituted in another State in respect of the said accident the proper law that must be applicable for the determination of the suit will be the *lex loci*, that is

[52] *Benson v Ashiru* (1967) NMLR 363, 365.
[53] (1979) 2 FNLR 144.

> to say, the law of the foreign State and not the law of the State in which the suit is instituted. See *Olayiwola Benson & Anor. v Joseph Ashiru* [1967] 1 All N.L.R. 184, *Grace Amanambu v Alexander Okafor & Anor.* [1966] 1 All N.L.R. 205 and *A.O Ubanwa & 4 Ors v C. Afocha & Anor.* (1974) 4 E.C.S.L.R 308 … I therefore hold that it is the law applicable in the Benue State of Nigeria that must be applicable in the determination of this action.[54]

On appeal, the Supreme Court endorsed the choice of law approach adopted by Iguh J (as he then was).[55]

In *Ajakaiye v Adedeji*,[56] the plaintiff-appellants claimed, as Administratrix and Administrator respectively, of the Estate of one Daniel Ajakaiye (deceased), for damages they suffered arising from the death of the deceased which occurred through the alleged negligence of the second defendant, who was, at the material time, driving the vehicle as the servant, agent, or employee of the first defendant.

Following the close of the defendants' case and address by the defence counsel, the plaintiffs applied to amend their statement of claim by substituting 'The Fatal Accidents Law Chapter 43 Laws of Northern Region of Nigeria, 1963 as adopted in the Laws of Gongola State' for 'The Torts Chapter 122, 1959 Laws of Western Region of Nigeria adopted in Oyo State of Nigeria'. The application was refused by the trial judge who observed that a plaintiff would not be allowed to amend his claim by putting up fresh claims in respect of a cause of action which, since the issue of the writ of summons, had become statute-barred and because the application in the instant case would prejudice the defendants.

Dissatisfied, the plaintiffs appealed to the Court of Appeal, contending, *inter alia*, that the trial judge was wrong to have refused their application to amend their pleading to plead the Fatal Accidents Law of Northern Nigeria as applicable in Gongola State, before judgment, when the amendment sought was designed to bring the pleadings in line with the evidence already adduced before the trial court. The Court of Appeal allowed the appeal.

Omololu-Thomas JCA, in his leading judgment (with whom other Justices of the Court of Appeal agreed), rightly observed that the trial judge had failed to appreciate the conceptual distinction between choice of law and choice of jurisdiction. He held that:

> when the application was made the issue to which the trial judge ought to have confined himself is *not* the question of jurisdiction at that stage – upon which the appellants had not addressed the court, but of the applicable law in Oyo State having regard to the jurisdiction of the State High Court, the nature of the amendment sought and the evidence before him: whether the Gongola State law sought to be substituted is the applicable law especially in view of the evidence.[57]

[54] *Agunanne v Nigerian Tobacco Company Ltd* (1979) 2 FNLR 144, 153.
[55] *Agunanne v Nigerian Tobacco Company Ltd* (1995) 5 NWLR (Pt. 397) 541.
[56] (1990) 7 NWLR 192.
[57] ibid, 204.

The Court of Appeal followed the Supreme Court in *Okafor* and *Ashiru* in allowing the appeal. The Court of Appeal distinguished *Okafor* on the basis that, in this case, the plaintiff was amending its pleaded applicable law from the *lex fori* to the *lex loci delicti*, unlike the situation in *Okafor* where the plaintiff insisted that it could found its application on the law of the forum, rather than the place where the tort took place. The Court of Appeal applied the reasoning and conclusion in *Okafor* as a choice of law rule by holding that the law of Gongola State was the applicable law, being the place where the tort took place.[58] The Court of Appeal applied the reasoning and conclusion in *Ashiru* (of the double actionability rule) as a choice of jurisdiction rule by holding that

> both the then Western Nigeria Torts Law and the present one and the Northern Nigeria Torts Law under reference are basically founded on the Fatal Accidents Acts of 1846 and 1864 and an action founded on Gongola State Torts Law would be actionable in Oyo State and applicable.[59]

In summation, it should be noted that all the cases discussed in this section relate to inter-State torts. The question is whether the same rules should be applied in respect of inter-State and international torts. The view expressed by the Supreme Court in *Okafor* in justifying the *lex loci delicti* rule, that the law of a State or country applies only within its territorial scope, is now open to question in view of globalisation. Private international law operates in such a way that the law of a State or country *could* apply to tort situations even where the tort did not occur in the particular State or country.

As stated earlier, the inflexible *lex loci delicti* rule applied by Nigerian courts as a choice of law rule has the advantage of providing more legal certainty, predictability and uniformity of decisions. However, the disadvantage of this rule is that it is too rigid and could work hardship in some cases, as was observed in *Boys v Chaplin* and *Babcock v Jackson*.

As stated earlier, unlike the parties to commercial contracts, the tortfeasor and victim do not usually choose a governing law to determine their disputes. It is not fair for the *lex loci delicti* to be 'imposed' on parties to a tort, without providing for exceptions to meet the justice of the case. Suppose that two Nigerians (Party A and Party B), being Army personnel, are on a temporary peace-keeping mission in country C and while in country C, Party A drives Party B in his car, and due to the negligence of Party A, Party B is seriously injured in an accident. If the plaintiff sues in Nigeria, it would be unjust to apply the law of country C if the application of that law deprives Party B of a remedy. Party B could also be given the option to rely on Nigerian law in this situation since both parties are Nigerians.

The law that applies to a tort should be such that it leans more favourably in the interest of the victim of the tort. The choice of the applicable law for torts should be such that it provides the victim of the tort with options as to the determination

[58] ibid, 207–8.
[59] ibid, 209.

of the applicable law. This approach does not necessarily punish the tortfeasor if it is applied with circumspection. Admittedly, this approach, in reality, will lean against the interest of the tortfeasor when compared to the victim of the tort.

Flowing from the above, first it is proposed that as an exception, Nigerian courts should apply the criteria of a pre-existing relationship between the parties as a way of displacing the application of the *lex loci delicti* to meet the justice of individual cases. This is an approach that is also utilised in the European Union choice of law rules for non-contractual obligations for the purpose of relying on the escape clause, and might be justified on the basis that it both respects the parties' legitimate expectations and meets the need for sound administration of justice. A pre-existing relationship could be defined as a common relationship between the parties deserving of the application of the law with the most significant relationship to the parties or their dispute. This includes, but is not limited to, a tort situation arising out of a contractual relationship between the parties which has a governing law in the contract, a family relationship, common nationality, common residence (or habitual residence), and common domicile at the time judicial proceedings are instituted. The victim of the tort should also be afforded the opportunity of making a choice between the *lex loci delicti* and the law that governs the pre-existing relationship between the parties.

Second, the 'better law' should be applied as a residual rule or escape clause where the victim of a tort is deprived of a remedy or compensation under the *lex loci delicti*, and there is a law of another country that is the most significant relationship between the parties. This should be a truly exceptional remedy. Due to the uncertainty the better law approach may generate, it should be confined to two main situations. First, it should only operate as an exception to the *lex loci delicti* rule, and not the pre-existing relationship rule. Second, the other law advanced by the tortfeasor must have the most significant connection to the dispute between both parties.

In summation, the tort should be governed by the *lex loci delicti*, with room for exceptions. In order to meet the justice of the case, the victim of the tort could choose between the *lex loci delicti* and the country or State with the most significant relationship or connection with the parties.

IV. Party Autonomy

Party autonomy is a recognised principle in Nigerian private international law.[60] Parties have the right to choose the law that governs a tort dispute between them. The freedom to choose the law that governs a tort hardly ever arises in practice as,

[60] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530–31 (Adekeye JSC). See also *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520, 544 (Oputa JSC); *Eagle Super Pack (Nig) Ltd v ACB Plc* (2006) 19 NWLR 21.

unlike contractual issues, parties in the normal course of events do not envisage a tort occurring. In addition, the tortfeasor and victim would likely not agree on the law that should govern the tort due to opposing interests: the victim of the tort is likely to propose a law that increases the quantum of compensation paid by the tortfeasor, while the tortfeasor is likely to propose a law that excludes or reduces its liability to the victim of the tort.

The manner in which party autonomy is likely to apply to tort situations is the use of the law that governs a contract to govern a tort dispute arising out of the contract. This is an approach also utilised in the European Union choice of law rules, called the doctrine of accessory allocation.[61] It is an approach that leads to certainty, predictability, and uniformity in resolving the dispute between the parties, and might also meet the parties' legitimate expectations.

For example, a Nigerian who works for a subsidiary Nigerian company situated in Angola has his or her contract governed by Nigerian law. The Nigerian, while working offshore in Angola for the Nigerian company, is injured and loses his leg due to his employer not providing a safe work environment. The Nigerian employee sues the subsidiary company and Nigerian parent company in Nigeria for the tort of negligence. Party autonomy could be applied in this context by giving effect to the law governing the contract between the parties and applying it to the tort dispute. However, as suggested in our reformulation of the Nigerian choice of law methodology, the victim of the tort could be given the option of relying on the *lex loci delicti* (Angolan law), which is a significant connecting factor in this case, or the law governing the pre-existing relationship between the parties (Nigerian law). This approach aids the sound administration of justice by giving the victim options to pick and choose any of the two laws that has a significant connection to the parties' dispute and offers him a better remedy.

V. Splitting the Applicable Law

A Nigerian judge may split the applicable law (otherwise known as 'judge-made *dépeçage*') to different issues arising out of the tort. For example, a Nigerian judge could apply a law to govern the liability of the parties and different law to govern the compensation of the parties. This is not an approach that has been utilised by Nigerian appellate courts in the reported cases discussed in this chapter. Nigerian appellate judges, as a matter of practice, apply a single law to all the issues arising out of a tort.

The use of judge-made *dépeçage* has the advantage of doing justice in individual cases, such as where the applicable law which governs liability of the tortfeasor

[61] For its application to contracts see CSA Okoli, 'The Significance of the Doctrine of Accessory Allocation as a Connecting Factor under Article 4 of Rome I Regulation' (2013) 9 *Journal of Private International Law* 449.

may not provide a remedy to the victim of the tort so that the Nigerian court might apply another law that has a significant connection to a particular issue in compensating the victim of the tort.

The disadvantage of judge-made *dépeçage* is that it is not very convenient for the purpose of determining the applicable law. In other words, it is easier to apply a single law to the parties' dispute than different laws. It also saves the time and costs of hiring experts versed in different laws to determine the content of different laws in an international situation. This approach could, however, lead to uncertainty and incongruity, such as a situation where one law that governs an issue arising out of the tort affords the victim of the tort compensation, while another law that governs another issue arising out of the tort excludes the liability of the tortfeasor. This perhaps explains why the European legislators and European courts in their choice of law process generally avoid the approach of judge-made *dépeçage*.[62]

It is recommended that if Nigerian judges are attracted to the concept of judge-made *dépeçage*, it should be applied in truly exceptional cases so as to avoid the uncertainty that may result in the choice of law process.

VI. Mandatory Rules

A mandatory norm or rule is the application of a law which the parties cannot derogate from, even by agreement. Mandatory rules are important to a country's legal system so that such a country would not allow parties to the agreement to contract out of the country's applicable statute. Mandatory rules are usually used on policy grounds to protect weaker parties. Although the definition of weaker parties is somewhat elusive, a weaker party may be a non-commercial actor or one who is not skilled or knowledgeable in the contractual or non-contractual relationship between the parties. Examples of weaker parties are employees and consumers. It is recommended that where a weaker party is not afforded sufficient protection under the foreign applicable law, the Nigerian court can apply the law of the forum if the law of the forum offers better protection.

Nigerian appellate courts have applied the concept of mandatory norm to consumers in the aviation industry. In Nigeria, the Civil Aviation (Repeal and Re-Enactment) Act 2006 governs all matters relating to civil aviation in Nigeria. It also repeals some previous statutes on the subject, including the Warsaw Convention.[63] Prior to this repeal, the Warsaw Convention, 1929, which is an international statute, had always been recognised and applied as Nigerian law.[64]

[62] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 at [42], [43], [45], [46], [48] & [49].

[63] Carriage by Air (Colonies, Territories and other Trust Territories) Colonial Order 1953 ('Warsaw Convention'). See s 77(1)(a) of the Civil Aviation Act. *Cf* F Majiyagbe, 'The Montreal Convention 1999 and Nigerian Law: Uncertainty, Uninterrupted' (2008) 33 *Air and Space Law* 346.

[64] *Swiss Air Transport Company Ltd v African Continental Bank* (1971) 1 NCLR 213.

The Montreal Convention applies to all international carriage of persons, luggage or goods performed by an aircraft, whether for reward or done gratuitously. 'International carriage' means a contract in which, according to the contract made by the parties, the place of departure and the place of destination are within the territories of two High Contracting States or within the territory of a single contracting State.

Section 48(1) of the Civil Aviation (Repeal and Re-Enactment) Act provides that the provisions contained in the Montreal Convention, and as amended from time to time, shall apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of the Civil Aviation Act, govern the rights and liability of carriers, passengers, consignors, consignees and other persons.

Nigerian courts have consistently interpreted the Warsaw Convention and the Montreal Convention as mandatory statutes from which parties to an international carriage by air 'cannot contract out' by relying on any other law, including domestic Nigerian common law and statutes.[65] The implication of these decisions is that, assuming an airline provides that the law of a particular country should govern an international carriage by air, if an accident occurs leading to a suit being instituted in Nigeria for the tort of negligence, a Nigerian court must disregard the chosen law between the parties and apply the Montreal Convention (or the Warsaw Convention as the case may be) to the parties' dispute.

The leading case or *locus classicus* on this subject is the Supreme Court's decision in *Ibidapo v Lufthansa Airlines* ('*Lufthansa Airlines*').[66] In *Lufthansa Airlines*, the plaintiff-appellant was a passenger on the defendant-respondent's flight LH 561 from Lagos to Frankfurt on 16 January, 1987. The plaintiff-appellant checked in baggage containing an IBM typewriter, which he claimed he bought for US$1,785. On arriving at Frankfurt, the typewriter was missing, and the plaintiff-appellant promptly lodged a complaint to the defendant-respondent. The defendant-respondent failed in its efforts to locate the baggage and offered the plaintiff-appellant DM 749 as compensation. The plaintiff-appellant was unhappy about the offer made to him and communicated his displeasure to the defendant-respondent. The defendant-respondent did not reply to the plaintiff-appellant.

The plaintiff-appellant sued the defendant-respondent, *inter alia*, in negligence for damages (or breach of contract). The defendant-respondent in response relied on Article 29(1) of the Warsaw Convention and argued that the action should have been brought within two years of the loss of the typewriter. The plaintiff-appellant

[65] *Oshevire v British Caledonia Airways Ltd* (1990) 7 NWLR 489, 521; *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *Cameroon Airlines v Otutuizu* (2011) 4 NWLR (Pt. 1238) 512, 539; *Harka Air Services (Nig) Ltd v Keazor* (2011) 13 NWLR (Pt. 1264) 320, 344; *Emirates Airline v Ngonadi (No. 1)* (2014) 9 NWLR 429, 492, 494–95; *Emirates Airline v Ngonadi (No. 2)* (2014) 9 NWLR 506; *British Airways v Atoyebi* (2014) LPELR-23120 (SC) 1, 28–29.

[66] (1997) 4 NWLR 124.

sought to place reliance on the Limitation Law of Lagos State. The trial judge declined to apply the Limitation Law of Lagos State and applied Article 29(1) of the Warsaw Convention. On appeal to the Court of Appeal and Supreme Court, the lower court's decision was affirmed. The Supreme Court applied Article 29(1) of the Warsaw Convention as a mandatory statute in relation to the limitation period (or time bar) for instituting an action for damages in international carriage of goods by air.[67]

In *Harka Air Service Nigeria Ltd v Keazor* ('*Keazor*'),[68] the claimant-respondent was a passenger on board the defendant-appellant's aircraft on a flight from Kaduna to Lagos. There was bad weather close to the destination as a result of which other airlines cancelled their flights. The claimant-respondent alleged, *inter alia*, that the flight to Lagos was turbulent; he suffered injuries and body pain; he lost his hand luggage and personal items; he was later treated at the hospital where he sought medical treatment; the injuries the claimant-respondent suffered curtailed his day-to-day activities; and he suffered loss professionally and financially.

The claimant-respondent sued the defendant-appellant at the Federal High Court for willful misconduct and claimed damages. The trial court and Court of Appeal, *inter alia*, granted the claimant-respondent's relief sought by applying the Warsaw Convention. On appeal to the Supreme Court, the decisions of the lower courts were affirmed. Adekeye JSC, in her leading judgment, pronounced on the status of the Warsaw Convention and held that:

> The Warsaw Convention is an international treaty, an international agreement, a compromise principle which the High Contracting States have submitted to be bound by the provisions. They are therefore an autonomous body of law whose terms and provisions are above domestic legislation. Thus, any domestic legislation in conflict with the Convention is void. The purpose and intention of the Warsaw Convention is to remove those actions governed by the Warsaw Convention as amended by the Hague protocol from the uncertainty of the domestic laws of the Member States. The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that must be had for such right and not the domestic/common law for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to the terms and conditions of the Convention and cannot be pursued under any other law.[69]

In *Emirates Airline v Ngonandi (No. 1)*,[70] the plaintiff-respondent was a student at a Canadian University. She purchased a return ticket to Canada from the defendant-appellant's agent in Nigeria. She had no problems boarding the defendant-appellant's plane to Canada. On her return journey, she was checked in at the airport by the defendant-appellant's staff, but at the point of boarding, she was stopped on the ground that her ticket was not valid. Her explanation, that it was the same ticket

[67] *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR 124.
[68] (2011) 13 NWLR 320.
[69] *Harka Air Service (Nig) Ltd v Keazor* (2011) 13 NWLR 320.
[70] (2014) 9 NWLR 429.

used for her journey to Canada, did not persuade the defendant-appellant's officer, who insisted that she should be escorted out of the airport.

The plaintiff-respondent had to liaise with her parents in Nigeria who directed her to take a taxi and get accommodation in Ontario, Canada. She missed the flight and could not be with her family for Christmas that year. Efforts made by her at the defendant-appellant's office in Canada did not yield any positive results. Her lawyer also wrote to the defendant-appellant to get relief but to no avail. She therefore filed an action against the defendant-appellant. The trial court granted all the claims of the claimant, including a substantial claim for ₦10,000,000 (10 million Naira) in general damages and ₦2,000,000 (two million Naira) for legal costs. The trial court also held that the provisions of Section 34 of the 1999 Constitution had been violated, which protects the rights of Nigerian citizens against inhuman and degrading treatment. The defendant-appellant appealed the judgment and relied on Article 29 of the Montreal Convention which provides that punitive, exemplary, and other non-compensatory damages cannot be recovered. The Court of Appeal applied the provisions of the Montreal Convention as a mandatory statute by applying the Supreme Court's decision in *Keazor*, and allowed the appeal in part with respect to the award of ₦10,000,000 in general damages and ₦2,000,000 for legal costs, which it considered as excessive compensation. The Court of Appeal also held that the provisions of Section 34 of the 1999 Constitution had no bearing on the case, and resort must be made exclusively to the Montreal Convention.[71]

VII. Public Policy

Public policy has some similarities with mandatory rules as well. They both aim at protecting the legal, social, political, and economic fabric of a country. The difference appears to be that, while mandatory rules are concerned with provisions important to a state as provided in legislation which the parties cannot contract out of through another law, public policy has a wider reach, in the sense that it takes effect even if there is no legislation specifying subject-areas where the parties cannot contract out of a 'mandatory statute', or where the court is bound to apply a statute to the parties' relationship (like the provisions of the Montreal Convention). Public policy was defined by the Nigerian Court of Appeal in *Dale v Witt & Busch*[72] as 'community sense and common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare and the like.'[73] In other cases, the Court of Appeal also defined public policy as the 'policy of not sanctioning an act which is against public interest in the sense

[71] See also *Saudi Arabian Airlines v Jahlive Sadakka Nigeria Limited* (2018) LPELR-46771 (CA).
[72] (2001) 33 WRN 62.
[73] *Dale v Witt & Busch* (2001) 33 WRN 62.

that it is injurious to the public welfare or public good.'[74] Public policy is a very vague concept, so that it is only applied in truly exceptional situations.[75] Where the applicable law offends the public policy of Nigeria, Nigerian courts should not apply it.[76]

VIII. Scope of the Applicable Law

The law that applies to a tort is one of considerable significance in cross-border transactions. The law that applies to a tort is a very significant factor a Nigerian court may take into account in deciding whether to exercise jurisdiction on the basis of *forum non conveniens*, either at the *ex parte* stage when the plaintiff requests that a Nigerian court serves a foreign defendant outside the jurisdiction of the court, or at the stage where the defendant appears to contest the exercise of the court's jurisdiction. The applicable law is also of substantive significance since it applies to determine the merits of the case. It is in this latter regard that the scope of the applicable law becomes an important issue.

Nigeria does not have a statutory provision dealing with choice of law issues in tort. The existing case law also does not directly address this issue. It is within this context that the comparative experiences of other legal systems become significant. It is recommended that Nigerian courts should be persuaded or guided by the approach of the European Union. In the European Union choice of law rules on torts, the scope of the applicable law governs the following issues:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;
(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provisions of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person; and
(h) the manner in which an obligation may be extinguished and the rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

[74] *Total Nigeria Plc v Ajayi* (2004) 3 NWLR (Pt. 860) 270, 294; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 92.
[75] See generally *Sonnar (Nig) Ltd v Norwind* (1987) 4 NWLR 520.
[76] *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR 495, 530 (Adekeye JSC).

The above-stated issues are matters of substance which are governed by the *lex causae*. Other matters not stated above are governed by the *lex fori* (Nigerian law) as a matter of procedure. Another point worthy of note is that where the *lex causae* is not Nigerian law, then as foreign law, it has to be pleaded and proved as a matter of fact; otherwise Nigerian law would apply.

IX. Conclusion

This chapter has discussed the law applicable to torts in inter-State and international situations. The distinction between jurisdiction and choice of law was discussed. Due to the difficult policy choices that choice of law in torts generates, a comparison was made of the approaches applied by various scholars, courts and legislators in Europe, the United States of America, and England. Based on this comparative perspective, we suggested a reformulation of the Nigerian choice of law methodology. This chapter also discussed matters of splitting the applicable law, party autonomy, mandatory rules, public policy, and scope of the applicable law. It is hoped that the Nigerian judiciary, particularly the Supreme Court, will take an active role in shaping the Nigerian choice of law process for torts in the future.

10

Foreign Currency Obligations

I. Introduction

Claims in foreign currency raise significant private international law issues. The resolutions of such issues have serious financial implications for the parties, particularly due to the fluctuation in exchange rates and the depreciation of foreign currencies. The Nigerian currency is the Naira, which is divided into 100 kobo.[1] In Nigeria, 'foreign currency' means

> any currency, other than Nigerian currency, and includes any note which is or has at any time been legal tender in any territory outside Nigeria, and where reference is made to foreign currency, the reference is made to foreign currency in respect of any credit or balance at a bank.[2]

This chapter provides a historical review of the jurisprudence on the power to award foreign currency judgments in Nigeria, and examines the legal bases for awarding foreign currency judgments, the jurisdictional power to award foreign currency judgments, the factors considered where a conversion of currency is required, the effect of change in foreign currency as a legal tender, and the effect of legislation on foreign currency claims.

II. Judicial History of Power to Award Foreign Currency in Nigeria

A significant number of Nigerian judges rely on the decisions of English courts as a reference point in relation to the power to award foreign currency judgments. This explains why Chukwuma-Eneh JSC expressed the view that Nigerian 'courts have always followed English cases in matters of this nature i.e., in entering judgment in foreign currencies in commercial cases.'[3] The significance of this point is that the Nigerian jurisprudence on the power to award foreign currency

[1] Central Bank of Nigeria Act 2007 s 15.

[2] Foreign Exchange (Monitoring and Miscellaneous Provisions) (Decree No 17 of 1995) Act, Cap F34 LFN 2004 s 41.

[3] *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589.

judgments at common law was largely influenced by the English jurisprudence.[4] This is unsurprising as Nigeria is a common law country which has historical ties to England and its legal system.

Initially, the Supreme Court held, in *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* ('*Aluminium Industries*'),[5] that Nigerian courts have no jurisdiction to give judgments in foreign currency. In this regard, the Supreme Court also held that the general rule that a simple contract debt is situated where the debtor resides or is to be found - because there the debt can be enforced against him by process of law - does not appear to be displaced by a stipulation for payment elsewhere. However, a stipulation for payment by a resident of Nigeria outside Nigeria and in foreign currency of a debt contracted outside Nigeria gives no right to payment of the debt in Nigeria, but only a right to damages for breach of contract expressed in Nigerian currency, in which only Nigerian courts can give judgment.[6]

The Supreme Court, at the time, followed the decision of the House of Lords (now the Supreme Court of the United Kingdom), which held that it could only give its judgment in Pounds Sterling, as it had no jurisdiction to give judgment in foreign currency.[7] It is important to note that after the House of Lord's decision in *Re United Railways of Havana and Regla Warehouses Ltd* ('*Havana*'), which held that the English court could only award a judgment expressed in Pounds Sterling, Lord Denning, at the Court of Appeal, in a bold and daring judgment, later held that this was no longer good law in England and that English courts *could* award foreign currency judgments.[8] In a later case, the House of Lords, in the landmark decision of *Miliangos v George Frank (Textiles) Ltd* ('*Miliangos*'),[9] held that it could award foreign currency judgments and overruled *Havana*. The judgment in *Miliangos* was revolutionary as it also affected the jurisprudence of many Commonwealth countries on the award of foreign currency judgments.[10]

Despite the binding Nigerian Supreme Court decision in *Aluminium Industries* on other courts in Nigeria, the Nigerian judiciary began to experience its own

[4] This appears to also be the case with other Commonwealth jurisdictions. See generally V Black, *Foreign Currency Claims in the Conflict of Laws* (Oxford, Hart Publishing, 2010).

[5] (1971) 2 NCLR 121.

[6] 'What however is certainly clear to us is that the only place where the appellant company could recover in Swiss currency, assuming it would be able to sue, would be in Switzerland. The only place under the terms of the loan where the appellant company had the right to payment of interest was in Switzerland in Swiss francs and it had no right to payment of interest in Swiss francs in Nigeria and could not so sue in Nigeria. If an action was brought in Nigeria by the appellant company it would have had to be for breach of contract and the damages awarded could only be in Nigerian currency as Swiss currency could not be awarded in a Nigerian court' – Lewis JSC in *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* (1971) 2 NCLR 121, 133.

[7] *In re United Railways of Havana and Regla Warehouses Ltd* [1960] AC 1007.

[8] *Schorsch Meier GmbH v Hennin* [1975] 1 All ER 152. For an earlier case in point see *Oceanska Plovidba v Castle Investment Co* [1974] QB 292, [1973] 3 WLR 847 (CA).

[9] [1976] AC 443.

[10] V Black, *Foreign Currency Claims in the Conflict of Laws* (Oxford, Hart Publishing, 2010); RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 154–67.

quiet revolution relating to the power to award foreign currency judgments. It appears that the first reported case to hold that Nigerian courts had the power to award foreign currency judgments after the Nigerian Supreme Court's decision in *Aluminium Industries* was the decision of Anyaegbunam P at the then Federal Revenue Court, Lagos in *Tankereederi Ahrenkiel GmbH v Adalma International Services Ltd* ('*Tankereederi*').[11] In this case, the plaintiff claimed US$120,990 as general and special damages for the defendant's breach of a charterparty agreement. The defendant contended that no court in Nigeria could entertain the claim because it was in a foreign currency. The trial court held in favour of the plaintiff. Interestingly, Anyaegbunam P, without any reference to the Supreme Court's decision in *Aluminium Industries*, embarked on a review of the English authorities at the time and observed that the position in England had changed, as the old law had been overruled by the House of Lords and English courts could now award judgment in foreign currency.[12] Anyaegbunam P held that:

> I hold that by virtue of the above [English] authorities and also by the fact which is notorious that Nigerians enter into many contracts with foreign nationals especially in Admiralty matters, this Court can give judgment in a foreign currency. Apart from Admiralty causes and matters, the rate at which Nigerians engage in international contracts and transactions makes it desirable that Nigerian Courts, if called upon to adjudicate on any of the transactions, should give judgment in the currency of the contract. When judgment is given in a foreign currency, I have no doubt that the Central Bank of Nigeria will respect the judgment and co-operate, bearing in mind that the Courts will check and punish any person who tries to syphon away the country's currency illegally.[13]

At the Court of Appeal, judges at the time did not agree on whether Nigerian courts had jurisdiction to award foreign currency judgments. Thus, the quiet revolution against the Supreme Court's decision in *Aluminium Industries* was interrupted by the Court of Appeal's decision in *United Bank for Africa v Koya* ('*Koya*'),[14] which held that Nigerian courts did not have the jurisdiction to award foreign currency judgments.[15] The basis of the Court of Appeal's decision was that English courts actually started issuing foreign currency judgments because England became a

[11] (1979) 2 FNLR 169.

[12] *Tankereederi Ahrenkiel GmbH v Adalma International Services Ltd* (1979) 2 FNLR 169, 177–78. Anyaegbunam P made reference to Lord Denning's judgment in *Miliangos v George Frank (Textiles) Ltd* [1975] 1 QB 487, which was upheld by the majority of the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, overruling the decision in *In Re United Railways of Havana and Regla Warehouses Ltd* [1960] AC 1007.

[13] *Tankereederi Ahrenkiel GmbH v Adalma International Services Ltd* (1979) 2 FNLR 169, 178. See also *Agu Bolton WM Miller's Nacfolger v Benue Cement Company Ltd*, delivered on 30 January 1991; *Tawa Petroleum Products v Owners of MV Sea Winners* (1980) 2 Nigerian Shipping Cases 25 (Belgore J as he then was).

[14] (Unreported) delivered on 1 September 1988 cited in *Melwani v Chanhira Corporation*, (1995) 6 NWLR 438, 453.

[15] *United Bank for Africa v Koya* (Unreported) delivered on 1 September 1988 cited in *Melwani v Chanhira Corporation*, (1995) 6 NWLR (Pt. 402) 438, 461.

signatory to the European Economic Community Treaty (the 'Treaty of Rome'),[16] and courts in Nigeria, which is not party to the Treaty of Rome, could not award judgments in foreign currency except when authorised by statute.[17] The Court of Appeal also stressed the importance of protecting the Naira by not generally awarding foreign currency judgments. The judgment of Akanbi JCA (as he then was) is worth quoting as it is a point that will be returned to:[18]

> the fact cannot be ignored that the dollar is a powerful currency. The Naira is not. It is unstable and continues to change like a 'weather crock every gust that blows'. But that is the currency for which, in the absence of any statutory provision, judgment may be given in our Courts. That is the currency that will not involve the claimant and the defendant in intricate problems of foreign exchange laws and controls. And a claimant who transacts in a foreign currency must in any subsequent suit arising from that transaction, claim the Naira equivalent. It is his duty to adduce evidence to that effect: and the court to give judgment in local currency. In the result, therefore, I resolve the issue in favour of the appellant and hold that the trial Judge was wrong in giving judgment in foreign currency.[19]

Subsequent Court of Appeal decisions, however, held that Nigerian Courts had the power to award foreign currency judgments, though no reference was made to the earlier Court of Appeal's decision in *Koya*.[20] These subsequent Court of Appeal decisions also made reference to the change of the law in England.

In *Melwani v Chanhira Corporation* ('*Melwani*'),[21] the Court of Appeal followed its decision in *Koya* and held that Nigerian courts cannot give judgments in foreign currency, except where the statute so provides, as in the case of the Admiralty Jurisdiction of the Federal High Court.[22] In this regard, Uwaifo JCA (as he then was) declared the Court of Appeal's decision in *Koya* to be rightly decided and the subsequent Court of Appeal decisions, which held to the contrary, to have been erroneously decided.[23] In delivering the leading judgment, he also embarked on a review of the English jurisprudence on the subject.[24] He was also of the view that the basis upon which English courts award judgments in foreign currency was influenced by the UK being a signatory to the Treaty of Rome.[25] He also held that

[16] Reference was made to the English case of *Schorsch Meier GmbH v Hennin* (1975) 1 All ER 152.

[17] *United Bank for Africa v Koya* (Unreported) delivered on 1 September 1988 cited in *Melwani v Chanhira Corporation* (1995) 6 NWLR 438, 461.

[18] Akanbi JCA's judgment in *United Bank for Africa v Koya* (Unreported) delivered on 1 September 1988 cited in *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 279 is relied upon as a reference point that Nigerian courts do not award foreign currency judgments as a matter of course.

[19] *United Bank for Africa v Koya* (Unreported) delivered on 1 September 1988 cited in *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 279.

[20] *Metronex (Nig) Ltd v Griffin and George* (1991) 1 NWLR (Pt. 69) 651; *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S* (1992) 4 NWLR (Pt. 235) 361; *United Bank for Africa Ltd v Ibhafidon* (1994) 1 NWLR 90.

[21] (1995) 6 NWLR 438.

[22] *Melwani v Chanhira Corporation* (1995) 6 NWLR 438.

[23] ibid, 463.

[24] ibid, 463–67.

[25] ibid, 465.

on policy grounds, Nigerian courts should not award foreign currency judgments. In this regard, he stressed that a free flow of foreign currency judgments could negatively affect Nigeria's economy, drain Nigeria's foreign reserves, devalue the Naira, and promote international fraud.[26] He also drew support from the dissenting judgment of Lord Simon in *Miliangos v George Frank (Textiles) Ltd*[27] in holding that it was for the Nigerian legislature to determine whether the courts could grant foreign currency judgments, as in the case of the Admiralty Jurisdiction of the Federal High Court. Uwaifo JCA (as he then was), in his final analysis, fortified his position by reference to the then Exchange Control Act 1962, which prohibited transactions in foreign currency and judgments arising from foreign currencies, except with the permission of the Minister of Finance.[28]

The Court of Appeal, in subsequent cases, without reference to *Koya* and *Melwani*, held that Nigerian courts had the power to award foreign currency judgments.[29] Again, it is instructive to note that these decisions made no reference to the Supreme Court's decision in *Aluminium Industries*, which held that Nigerian courts had no such power.

The Supreme Court Justices were also not in agreement as to whether a Nigerian court could award a foreign currency judgment. The Supreme Court had commenced awarding foreign currency judgments without a specific consideration of whether it had jurisdiction to do so.[30] In *Bank of Baroda v Mercantile Bank Ltd*,[31] Iguh JSC held that '[t]here can be no doubt that the courts in appropriate cases, have the power and jurisdiction to enter judgment in favour of a party in the foreign currency claimed.'[32] This determination was actually *obiter*, as the

[26] ibid, 465–69.

[27] [1976] AC 443.

[28] *Melwani v Chanhira Corporation* (1995) 6 NWLR 438, 467–68. *Cf* Chukwuma-Eneh JSC disagrees with this viewpoint in *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589.

[29] *Prospect Textiles Mills (Nig) Ltd v ICI Plc England* (1996) 6 NWLR 668; *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192. See also *Pan African Bank Ltd v Ede* (1998) 7 NWLR 422; *Anyaorah v Anyaorah* (2001) 7 NWLR 158; *Nwankwo v Ecumenical Development Co Society* (2002) 1 NWLR 513; *Erik Emborg Export A/S v Jos International Breweries Plc* (2003) 5 NWLR 505; *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2005) 17 NWLR 305: *Harka Air Services (Nig) Ltd v Keazor* (2006) 1 NWLR 160; *Wema Bank Plc v Linton Industrial Trading Nigeria Ltd* (2011) 6 NWLR 479.

[30] See *Bank of Baroda v Mercantile Bank Ltd* (1987) NWLR (Pt. 60) 233. This explains why Uwaifo JCA (as he then was), in *Melwani v Chanhira Corporation* (1995) 6 NWLR 438, 462, considered the Supreme Court's decision in *Bank of Baroda v Mercantile Bank Ltd* (1987) NWLR (Pt. 60) 233, but refused to follow it because the issue as to whether Nigerian courts can award foreign currency judgment was not before the court. However, Ogundare JSC, in the latter case of *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 285–86, in overruling Uwaifo JCA (as he then was) in *Melwani*, would observe that there is 'now a growing tendency for courts to award judgments in foreign currency, see for example *Bank of Baroda v Mercantile Bank Ltd* (1995) LPELR-SC 166/1989 1, 35 where the claim before the trial court was in U.S. dollars and judgment was entered for the plaintiffs as claimed.'

[31] (1995) LPELR-SC 166/1989 1, 35.

[32] *Broadline Enterprises Ltd v Monetary Maritime Corporation* (1995) 9 NWLR (Pt. 417) 1, 30.

issue of whether Nigerian courts could award foreign currency judgments was not before the court. However, some Nigerian judges have later claimed that Iguh JSC's judgment was the first Supreme Court decision to recognise the power of Nigerian courts to award foreign currency judgments.[33]

In *Union Bank of Nigeria Ltd v Odusote Bookstores Ltd*,[34] Wali JSC expressed the view that Nigerian courts should reject foreign claims not expressed in local currency so that where the parties' transaction is in foreign currency, the judgment-debtor should simply provide the Naira equivalent to satisfy the judgment debt.[35]

The *Koya* case came before the Supreme Court[36] and the court was specifically asked whether Nigerian courts had the power to award foreign currency judgments. Suffice it to say that the claimant's appeal was dismissed, so that a consideration of whether Nigerian courts have the power to award foreign currency judgments was actually an academic exercise: a point which the Justices of the Supreme Court agreed with.[37] The significance of this point is that any pronouncement made regarding whether Nigerian courts had power to award foreign currency judgments was *obiter*.[38] Nevertheless, Ogundare JSC, in his concurring judgment, took it upon himself to provide an instructive, brilliant, and scholarly decision. Indeed, the concurring judgment of Ogundare JSC was later regarded by some other Nigerian appellate judges as a landmark judgment.[39]

After a detailed analysis of the jurisprudence in England and Nigeria, Ogundare JSC came to the conclusion that Nigerian courts generally have the power to award foreign currency judgments.[40] In this regard, he held that the decisions by the Court of Appeal in *Koya* and *Melwani*, that Nigerian courts cannot generally award foreign currency judgments, were erroneous. In addition, he held that the Court of Appeal, in these decisions, was wrong to have held that the basis upon which English courts award foreign currency was the UK being a party to the

[33] *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 289 (Ogundare JSC); 293 (Iguh JSC); *Nwankwo v Ecumenical Development Co Society* (2002) 1 NWLR 513, 540 (Fabiyi JCA as he then was); 543 (Olagunju JCA as he then was).

[34] (1994) 3 NWLR (Pt. 331) 129.

[35] It is open to question whether this judgment is one that actually recognises the powers of Nigerian courts to award foreign currency judgments, as some other Nigerian judges have relied on this decision as a basis to do so. See *Savannah Bank (Nig) Ltd v Starite Industries Overseas Corporation* (2001) 1 NWLR 194, 210–11; *Nwankwo v Ecumenical Development Co Society* (2002) NWLR 513, 543 (Olagunju JCA as he then was); *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589 (Mohammed JSC). It is submitted that on the contrary this decision is, in reality, no different from the old Nigerian and English approach that a foreign currency judgment must be expressed in Naira. In this regard see also *Momah v VAB Petroleum Inc* (2000) 4 NWLR 534.

[36] *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251.

[37] ibid, 267 (Onu JSC); 276 (Ogundare JSC); 293 (Iguh JSC).

[38] ibid, 267 (Onu JSC); 276 (Ogundare JSC); 293 (Iguh JSC).

[39] See *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 196–97 (Ayoola JSC); *Harka Air Services (Nig) Ltd v Keazor* (2006) 1 NWLR 160, 194 (Ogunbiyi JCA as she then was); *Harka Air Services (Nig) Ltd v Keazor* (2011) 13 NWLR 320, 355–56 (Adekeye JSC); *Wema Bank Plc v Linton Industrial Trading (Nig) Ltd* (2011) 6 NWLR 479, 512 (Saulawa JCA).

[40] *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 276–89.

Treaty of Rome.[41] On the contrary, Ogundare JSC observed that the then House of Lords had queried the correctness of their earlier approach.[42]

In holding that Nigerian courts *can* award foreign currency judgments, Ogundare JSC took into account the realities of Nigeria's legal system. He reached his decision on the following grounds:[43]

1. The Exchange Control Act, 1962 has been repealed, and the Naira allowed to float as market forces may determine.[44]
2. Under Section 17 of the Admiralty Jurisdiction Decree 1991, the Federal High Court is given jurisdiction to award judgments in foreign currency. It cannot be the intention of the legislature that other High Courts in Nigeria are not to have such jurisdiction.
3. The Arbitration and Conciliation Act ('ACA'), empowers the courts in Nigeria to enforce an arbitral award irrespective of the country in which it is made, and the ACA implements the articles of the Convention on the Recognition and Enforcement of Foreign Awards ('New York Convention') in Nigeria. The courts in Nigeria can, therefore, enforce arbitral awards in foreign currency. It is inconceivable that the courts can enforce arbitral awards in foreign currency but cannot entertain claims made in foreign currency.
4. The Foreign Currency (Domiciliary Accounts) Act[45] authorises citizens of Nigeria, persons resident in Nigeria, corporate bodies in Nigeria, diplomats, foreign diplomatic missions and international organisations to import foreign currency and deposit the same in a designated local bank account maintained in an approved foreign currency. On this basis there could be no procedural difficulty that can stand in the way of a creditor claiming from such an account-holder in foreign currency.
5. The Foreign Judgments (Reciprocal Enforcement) Act,[46] allows for the enforcement in Nigeria of judgments given in foreign countries, which would likely be in foreign currency.
6. There was a previous decision of the Supreme Court now affirming the power of Nigerian courts to award foreign currency judgments.

Ogundare JSC concluded, based on the above considerations, that Nigerian courts can also award foreign currency judgments, just like English courts, in view of the present-day realities, and the existence of extensive international commercial transactions.

[41] ibid, 280–81.
[42] ibid, 280–81.
[43] ibid, 288–89.
[44] *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589.
[45] It has now been repealed and replaced by the Foreign Exchange (Monitoring and Miscellaneous Provisions) (Decree No 17 of 1995) Act, Cap F34 LFN 2004 ('Foreign Exchange Act'). See Section 41 of the Foreign Exchange Act.
[46] See the Reciprocal Enforcement of Judgments Act 1922, LFN 1958 Cap 175. See also the Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960.

After the Supreme Court's decision in *Koya*, other Supreme Court Justices made judicial statements to the effect that 'there is no inhibition that a substantive claim could be brought in foreign currency';[47] and 'if there was any doubt that judgment can now be entered in foreign currency … the opinion of Ogundare J.S.C. in *Koya v United Bank for Africa Ltd* … should … lay such doubt to rest.'[48]

In recent times, there are a significant number of Supreme Court decisions consistently holding that Nigerian courts generally have power to award foreign currency judgments in appropriate cases.[49] This is the Supreme Court's position, notwithstanding the views later expressed by Chukwuma-Eneh JSC in *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* ('*Tunji*')[50] to the effect that he agrees with the:

> opinion as stated in *Melwani* … that apart from Section 17 of the Admiralty Jurisdiction Decree … giving specifically limited jurisdiction to the Federal High Court to give judgment in any foreign currency in Admiralty matters there is no general principle to give judgment in foreign currency as such.[51]

The implication of the views expressed by Chukwuma-Eneh JSC in *Tunji* demonstrates the need for legal certainty in this area of the law. It is necessary for the Supreme Court to re-examine its previous decision in *Aluminium Industries* based on the doctrine of *stare decisis*. Interestingly, there appears to be no reported case in which the Supreme Court has cited *Aluminium Industries.* It is submitted that the preferable approach is for the Supreme Court to expressly overrule *Aluminium Industries* so that the ghost of the archaic rule in that case, in relation to the award of foreign currency judgments, no longer perturbs the spirit of Nigerian private international law.

In summation, the practice of Nigerian courts in awarding foreign currency judgments is applauded. It is hoped that, in view of the well-developed jurisprudence Nigeria has on foreign currency judgments, Nigerian judges should no longer find it necessary to rely on English jurisprudence on the subject.

[47] *Momah v VAB Petroleum Inc* (2000) 4 NWLR 534. See also *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2005) 17 NWLR 305, 337–38.

[48] *Saeby Jernstoberi Maskinfabric S/A v Olagun Enterprises Ltd* (2001) 11 WRN 179, 196–97 (Ayoola JSC).

[49] It is not necessary to discuss them in detail. See *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619; *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1; *Harka Air Services (Nig) Ltd v Keazor* (2011) 13 NWLR 320; *First Bank of Nigeria Plc v Ozokwere* (2014) 3 NWLR 436. See also *Teju Investment and Property Co Ltd v SUBAIR* (2016) LPELR-40087 (CA); *ADIC Ltd v ZUMAX (Nig) Ltd* (2018) LPELR-43670 (CA) 20.

[50] (2010) 11 NWLR (Pt. 1206) 589.

[51] In this regard, Chukwuma-Eneh JSC's judgment in *Tunji* is *obiter*, because the relevant issue before the court was the determination of the time within which foreign currency judgment can be converted to Naira. Moreover, in this case, the claimant claimed in a foreign currency, and in the alternative, a conversion to the Naira equivalent. In other words, the issue as to whether Nigerian courts can award foreign currency judgments was not before the court.

III. The Legal Bases for Awarding Foreign Currency Judgments in Nigeria

A careful review of the Nigerian jurisprudence reveals the reasons why Nigerian judges award foreign currency judgments. It is significant to discuss the conceptual basis for awarding foreign currency judgments in Nigeria. A discussion of the legal bases for awarding foreign currency judgments in Nigeria is not merely one of academic interest – it is of immense practical significance as well. This section discusses the rationale for awarding foreign currency judgments in Nigeria and addresses the issue of whether a foreign currency judgment can be awarded as a matter of course.

A. Rationale for Awarding Foreign Currency Judgment

(i) Party Autonomy

The freedom of parties to enter into a contract which the court should enforce appears to be a major cornerstone upon which Nigerian judges award foreign currency judgments. Indeed, it is common knowledge that the principle of party autonomy is now widely accepted in private international law.

Where the parties expressly agree that payment should be made in a foreign currency, the Nigerian court ordinarily should respect the agreement of the parties. Sometimes, the parties actually make an unexpressed agreement (or an implied or deemed agreement) that their transaction should be in a foreign currency, such as where the parties, in their course of dealing, utilise (or agree to utilise) a foreign currency to perform or execute their transaction so as to leave the court in no doubt that the parties wanted any claim arising from their transaction to be settled in that foreign currency.

Hereafter, references are made to judicial statements of Nigerian judges in this regard, in order to better appreciate the principle of party autonomy in the award of foreign currency judgments. Belgore J (as he then was), in *Tawa Petroleum Products v Owners of 'MV Sea Winner'*,[52] brilliantly captured the principle of party autonomy when he held that:

> in the absence of any statutory limitations to my mind, the determining factor is the language of the contract. The duty of the court in construing a contract is to echo its language and to give remedy in the same language. If the party [*sic*] contracted for payment in Dollars there is no reason why the court should order payment in Naira.[53]

[52] (1980) 2 Nigerian Shipping Cases 25 cited in *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 277.

[53] ibid.

In *United Bank for Africa Ltd v Ibhafidon*,[54] Ejiwunmi JCA (as he then was) also captured the principle of party autonomy when he held that:

> The underlying reason would appear to be that as courts do not make contracts for parties, it is only right and proper that where parties have by their contract agreed to settle their claims in a particular currency or … it is evident that the contract was to be executed or was to be performed in a particular currency then any claim arising from a breach of contract ought to be settled in terms of that currency or that in which all the circumstances, the parties must be deemed to have agreed to liquidate their claims in relation to the contract.[55]

Iguh JSC also held that Nigerian courts:

> In appropriate cases, have the power and jurisdiction to enter judgment in the foreign currency claimed depending entirely on the particular facts and circumstances of a case. Where, for instance, the currency of a contract made, executed and enforceable in Nigeria is [a] foreign currency, our courts of competent jurisdiction would, in my opinion, have power to enter judgment in such foreign currency … The underlying principle is said to involve, and I agree entirely with this, that it is the duty of a debtor to pay his debt to the creditor in the currency of the contract according to its clear terms.[56]

(ii) Proximity

A foreign currency judgment can potentially be awarded even if the parties may not have entered into an agreement for payment to be made in foreign currency. Where the claimant's loss is most closely felt in a foreign currency, or where the transaction between the parties is most closely connected to the foreign currency of a particular jurisdiction (such as where the parties' contract has its closest connection with a foreign jurisdiction), Nigerian courts can award a foreign currency judgment. This reflects the principle of proximity in private international law. Proximity, in this context, simply means that the parties' transaction has its closest connection with a particular foreign currency. In a case of tort (delict or non-contractual scenario), proximity also means that the tort has its closest connection with a particular foreign currency.

However, the conceptual distinction between an unexpressed agreement of the parties to make their payments in foreign currency, and the principle of closest connection, could be blurred in practice, as both concepts share some similarities.

[54] (1994) 1 NWLR 90.

[55] *United Bank for Africa Ltd v Ibhafidon* (1994) 1 NWLR 90, 122.

[56] *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 292; *Broadline Enterprises Ltd v Monetary Maritime Corporation* (1995) 9 NWLR (Pt. 417) 1, 30. See also *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S* (1992) 4 NWLR 361, 385; *Prospect Textiles Mills (Nig) Ltd v ICI Plc England* (1996) 6 NWLR 668; *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 197; *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505; *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589.

It is of no practical significance to discuss or analyse the conceptual distinctions between the principles of 'unexpressed agreement' and 'proximity', as they both produce the same results as bases on which a Nigerian court can award a foreign currency judgment.

Justice Tobi, both at the Court of Appeal and the Supreme Court, appears to have captured the principle of proximity in two decided cases. In *Pan African Bank Ltd v Ede* ('*Ede*'),[57] the plaintiff-respondent imported goods from his overseas suppliers on three separate bills for US$14,400.00, US$22,992.00, and US$58,356.00 to facilitate payment between him and his overseas suppliers. The defendant-appellant prepared and issued three separate bills on the amounts respectively, for which the plaintiff-respondent paid ₦70,671.39, being the Naira equivalent of the bills at the time. Shortly after the payment, the respondent fell ill and was treated at a hospital. Upon recovery, he went to the defendant-appellant to inquire if the money had been remitted to his overseas suppliers. He was informed that the defendant-appellant had forgotten to collect from him the custom bills of entry that would have enabled it to send the money. The plaintiff-respondent immediately submitted the custom bills of entry and other relevant documents, and was informed that the exchange rate had appreciated. He was to pay the difference, calculated at an extra ₦7,250.13, which he subsequently paid.

The plaintiff-respondent's case was that the defendant-appellant did not remit the money to his overseas suppliers as agreed, and as a consequence, his overseas customers refused to send him goods because he was in default in paying for the goods sent and the overseas suppliers forfeited his original deposit of US$60,856.00. The plaintiff-respondent claimed that he went out of business as a result of this sequence of events. The plaintiff-respondent consequently sued the defendant-appellant and claimed, *inter alia*, the sum of US$95,748.00, being the amount paid to the defendant-appellant. The plaintiff-respondent was successful at the High Court. On the defendant-appellant's further appeal to the Court of Appeal, Tobi JCA (as he then was), in capturing the principle of proximity, brilliantly held that:

> where a transaction is predicated upon a party being paid in dollars for which he has paid the naira equivalent of the agreed sum, a court of law has the right to make an award in dollars.
>
> There is evidence that the transaction between the respondent and the overseas suppliers was in dollar[s]. There is also evidence that the respondent paid the appellant the naira equivalent of the dollars for the supply of the goods by the overseas suppliers. There is also evidence that the appellant received the money in naira but did not send the dollar equivalent to the overseas suppliers…
>
> It is therefore only fair that the appellant refunds the dollar equivalent of the naira, which the respondent paid.[58]

[57] (1998) 7 NWLR 422.

[58] *Pan African Bank Ltd v Ede* (1998) 7 NWLR 422, 436–37.

In *Afribank Nigeria Plc v Akwara* ('*Afribank*'),[59] the plaintiff-respondent also sued the defendant-appellant for failing to remit money to its overseas supplier for the supply of goods. The sum was to be transmitted to the plaintiff-respondent's overseas supplier for goods already supplied to the plaintiff-respondent. The plaintiff-respondent claimed that the defendant-appellant negligently failed to transmit the money to the overseas supplier. The transaction occurred in 1982, and at that time, the equivalent of £17,647.00 in Naira was ₦21,717.48. This was the amount that the plaintiff-respondent paid to the defendant-appellant. The plaintiff-respondent was unsuccessful at the High Court. On appeal to the Court of Appeal, suffice it to say that the Court of Appeal allowed the appeal, but awarded the plaintiff-respondent his claim for £17,647.00 in the sum of ₦21,717.48, with interest. The defendant-appellant was dissatisfied with the decision of the Court of Appeal and appealed. The plaintiff-respondent cross-appealed against the Court of Appeal's decision to award the £17,647.00 in the Naira equivalent. The Supreme Court unanimously allowed the cross-appeal. Tobi JSC, in his concurring judgment, again captured the principle of proximity when he held that

> in view of the fact that the entire case had so much foreign exchange content, the Court of Appeal was wrong in upholding the claim in foreign currency and making the award in Naira. I therefore award the respondent/cross-appellant the sum of £17,647 damages.[60]

(iii) Restitutio in Integrum

Restitutio in integrum is a maxim which means that the claimant should recover such sum as will place him as close as can be, by monetary compensation, to the same position he would have been in if the loss had not been inflicted on him, subject to the rules of remoteness of damage. Thus, no one should be made richer or poorer as a result of his damage or loss. The claimant should be restored to the same position he would have been if the loss or damage had not occurred.[61]

Some Nigerian judges have also rationalised the award of foreign currency judgments on the ground that the claimant should be restored to the same position it would have been if the disaster or damage had not occurred. This principle of *restitutio in integrum* applies equally in contract and tort in the award of foreign currency judgments.

It appears that the first reported case that rationalises the award of a foreign currency judgment on grounds of *restitutio in integrum* is the decision of Akpabio JCA in *Union Bank of Nigeria Plc v Eskol Paints Nigeria Ltd* ('*Union Bank*').[62]

[59] (2006) 5 NWLR 619.
[60] *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619, 650.
[61] *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157. See also *Kerewi v Odugbesan* (1965) 1 All NLR 95; *Ezeani v Ejidike* (1964) 1 All NLR 402; *Cross-lines Ltd v Thompson* (1993) 2 NWLR (Pt. 273) 74; *Soyinka v Inaolaji Builders Ltd* (1991) 2 NWLR (Pt. 177) 21.
[62] (1997) 8 NWLR 157.

In this case, the plaintiff-respondent claimed that sometime in 1982, it instructed the defendant-appellant to remit the sum of US$566,250.00 to a foreign company in Ireland, pursuant to an agreement between the plaintiff-respondent and the Irish company. As a condition precedent for approving the foreign exchange transaction, the Central Bank of Nigeria insisted that the defendant-appellant, as bankers of the plaintiff-respondent, must obtain a written guarantee on behalf of the plaintiff-respondent from a reputable bank in Ireland. The defendant-appellant bank duly obtained the guarantee but allegedly concealed it from the plaintiff-respondent.

In due course, the contract between the plaintiff-respondent and the Irish company, which was for the supply of building materials, failed to go through and it became necessary for the Irish company to refund the US$556,250.00 that it had received. The Irish company did not refund the money. It then became necessary for the defendant-appellant to obtain the refund from the Bank of Ireland, which had guaranteed the refund of the money. The Bank of Ireland also refused to pay the money, pointing out for the first time that the guarantee had expired on 31 December 1981, before the defendant-appellant even sent the money to Ireland.

It was on the above basis that the plaintiff-respondent, *inter alia*, sued the defendant-appellant in the sum of US$556,250.00 for negligence. The trial court, *inter alia*, found in favour of the plaintiff-respondent, and awarded ₦12,455,235.00, the amount the judge regarded as the Naira equivalent of the sum of US$556,250.00. The defendant-appellant was dissatisfied with the judgment and appealed. The plaintiff-respondent also cross-appealed the decision of the Court of Appeal, challenging, *inter alia*, the trial judge's award of ₦12,455,235.00 instead of its claim for US$556,250.00. The plaintiff-respondent based its cross-appeal on the principle of *restitutio in integrum*. In a unanimous judgment, the Court of Appeal dismissed the appeal and allowed the cross-appeal. Akpabio JCA, in delivering the leading judgment brilliantly, held the following:

> It follows from the above that the respondents in this case are to be restored to the same position they would have been in if the appellants had not negligently remitted their money to the Bank of Ireland on the 20/1/82. The question arises: - What was the position the respondents were in immediately before 20/1/1982? The answer is that they were the proud owners of $566,250.00 (US Dollars). Therefore, when they lost that amount through the negligence of the appellants, it is my respectful view that under the doctrine of '*restitutio in integrum*' the sum of $566,250.00 (US Dollars) lost through the negligence of the appellants, should be restored to them, for them to use in purchasing from elsewhere the commodities they wanted to purchase from Ireland.[63]

In the concurring judgment, Ige JCA also held that:

> The doctrine of *restitutio in integrum* should be invoked in this case to put the respondents in the position they would have been should the appellants not have been negligent in remitting their money $556,250 US Dollars to the Bank of Ireland on 20/1/82.

[63] *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157, 178.

Also, in *Afribank Nigeria Plc v Akwara*,[64] Oguntade JSC, in delivering the leading judgment, held the following:

> It seems to me that the award of ₦21,717.48 to the plaintiff/cross-appellant in the circumstances of this case is grossly unfair. If the case of the plaintiff/cross-appellant was that the defendant/cross-appellant negligently failed to pay £17,647 to the plaintiff/cross-appellant's overseas supplier and there was evidence that the debt remained unpaid, it ought to have occurred to the court below that in order to restore the plaintiff/cross-appellant to its pre-transaction position judgment for the £17,647 ought to have been given in foreign currency. This was the only conclusion which enable the plaintiff/cross-appellant would have enough money to pay the overseas suppliers. This, the defendant/appellant ought to have done in 1982.[65]

In *First Bank of Nigeria Plc v Ozokwere* ('*Ozokwere*'),[66] the Supreme Court re-affirmed this approach to awarding foreign currency judgments. In *Ozokwere*, the deceased brother of the plaintiff-respondent placed an order for the supply of motor spare parts, valued at US$186,990.00, from a foreign company registered in Hong Kong (the 'Hong Kong Company') in 1982. It was agreed that payment for the goods would be made through the defendant-appellant bank. The plaintiff-respondent paid the sum of US$186,990.00 for remittance to the Hong Kong Company. However, the Hong Kong Company delivered goods of a different description, which were contraband in Nigeria. This was contrary to the agreement between the Hong Kong Company and the plaintiff-respondent, and the defendant-appellant was notified about it. The plaintiff-respondent then demanded a refund of the sum paid to the defendant-appellant, who refused to refund the money.

On the above basis, the plaintiff-respondent, as the Administrator of the Estate of Ozokwere, claimed, *inter alia*, for the refund of the sum US$186,990.00 or its Naira equivalent and was successful. Onnoghen JSC, in delivering the leading judgment of the Supreme Court, held that the relationship between the parties was defined by the sum of US$186,990.00, which ought to also define the refund, or restitution, by the appellant bank.[67]

(iv) Sound Administration of Justice

A careful review of the rationale for awarding foreign currency judgment reveals that it also leads to the sound administration of justice. If the parties make an agreement for payment to be made in a foreign currency (party autonomy), or the transaction has its closest connection with a foreign currency (proximity), or a party felt its loss in a foreign currency and wants to be restored to the same position it was in before the loss in that foreign currency (*restitutio in integrum*), it

[64] (2006) 5 NWLR 619.
[65] *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619, 643.
[66] (2014) 3 NWLR 439.
[67] *First Bank of Nigeria Plc v Ozokwere* (2014) 3 NWLR 439, 464.

would amount to promoting the sound administration of justice if the court grants the claim in the foreign currency as well. The aim is not to make the claimant richer or poorer but simply to reflect the legitimate expectations of international commercial parties, that transactions involving foreign currency obligations will also be enforced in foreign currency.

It appears the first reported case where this criterion was applied is the Court of Appeal's decision in *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S*.[68] In that case, the defendant-appellant, which was a company registered in Nigeria that engaged in large-scale agriculture, placed an order for a feedmill machine, as well as spare parts, from the plaintiff-respondent. The plaintiff-respondent was a company with its registered office in Copenhagen, Denmark, which carried on the business of manufacturing and marketing agricultural machinery. The defendant-appellant made an agreement with the plaintiff-respondent for the delivery of certain agricultural machines including the feedmill. The plaintiff-respondent did as requested, but the defendant-appellant refused to pay because the feedmill supplied was defective, as it worked for only a few months, and the spare parts ordered with the feedmill were never supplied.

The plaintiff-respondent claimed, *inter alia*, for the sum of DKr 470,290.00 or its Naira equivalent in the sum of ₦235,145.50. The trial judge, *inter alia*, entered judgment for the plaintiff-respondent in the sum of ₦235,145.50, being the equivalent sum of DKr 470,290.00 as claimed by the plaintiff-respondent. On appeal, the defendant-appellant, *inter alia*, challenged the foreign currency award and its consequential conversion. The Court of Appeal unanimously dismissed the appeal. Salami JCA (as he then was) held that '[i]t will both be unjust and inequitable to allow the appellant to resile from its agreement to pay for the goods in Danish Krone.'[69] On appeal to the Supreme Court, this judicial statement was unanimously upheld.[70]

The Court of Appeal's later decision in *United Bank for Africa Ltd v Ibhafidon* ('*Ibhafidon*')[71] is perhaps a better illustration of how the criterion of the sound administration of justice applies to awarding foreign currency judgments. In *Ibhafidon*, a fraudster known as Mr. Ehinola, who was introduced to the plaintiff-respondent, claimed to have a large sum of money in dollars in his domiciliary accounts with the defendant-appellant. Mr. Ehinola offered to sell to the plaintiff-respondent at the rate of ₦4 to one US dollar. The plaintiff-respondent was not willing to accept the offer unless he could confirm the liquidity position of Mr. Ehinola's account. Mr. Ehinola and the plaintiff-respondent went to the defendant-appellant's central branch office in Lagos, where Mr. Ehinola applied to withdraw the sum of US$33,643.00 from his account. The bank official told them to come back the following day. The following day, the bank official informed the

[68] (1992) 4 NWLR 361.
[69] *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S* (1992) 4 NWLR 361, 385.
[70] *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 197.
[71] (1994) 1 NWLR 90.

plaintiff-respondent that he could proceed with the foreign exchange transaction, as Mr. Ehinola had sufficient funds to accommodate the amount applied for. The plaintiff-respondent claimed he handed over ₦137,572.00, the Naira equivalent of US$33,643.00, to Mr. Ehinola in the presence of the bank official. The plaintiff-respondent then claimed that the defendant-appellant, through one of its officials, drew up a bank draft for US$33,643.00 in his favour and handed it over to him. The plaintiff-respondent took the bank draft to the defendant-appellant's branch in Benin and was informed he would able to cash the draft. He was also advised to open an account with the draft, which he did on 18 December 1986, and subsequently was allocated an account number with a teller, through whom he paid the draft into his account with the defendant-appellant. The plaintiff-respondent was asked to call the bank back after 21 days to collect the proceeds on the draft.

The defendant-appellant subsequently discovered that Mr. Ehinola opened his account with a forged cheque and refused to pay the plaintiff-respondent at the appointed time, despite repeated demands. It was on these facts that the plaintiff-respondent, *inter alia*, claimed the sum of US$33,643.00. The plaintiff-respondent was successful in this regard at the trial level. The defendant-appellant, *inter alia*, challenged the foreign currency judgment on appeal. The Court of Appeal unanimously dismissed the appeal. Ejiwunmi JCA (as he then was), in delivering the leading judgment, held as follows:

> In the case in hand it is not only right but proper to make the award in US dollars as it is evident that the whole transaction was predicated upon the respondent being paid in dollars for which he paid the naira equivalent of the agreed sum. To order otherwise would be unjust as it may lead to the respondent either being paid a sum higher or lower than the sum in dollars which had purchased having regard to the ever changing value of the naira to the US dollar. The order of the learned trial judge awarding judgment in favour of the respondent in US dollars is therefore upheld by me.[72]

In applying the criteria of sound administration of justice in awarding foreign currency judgments, other Nigerian judges have also used the phrase 'fair and just'.[73] Thus, in the case of *Harka Air Services (Nig) Ltd v Keazor* ('*Keazor*'),[74] Rhodes-Vivour JSC, in his concurring judgment at the Supreme Court awarding damages for personal injury and loss in US Dollars, held the following:

> My lords, the basis for judgment in foreign currency is that currencies are no longer stable. They all swing around with every gust that blows. Once parties plead their case properly, judgment should be given in any currency provided it is *fair and just* (emphasis added).[75]

[72] *United Bank for Africa Ltd v Ibhafidon* (1994) 1 NWLR 90, 122.

[73] 'It is therefore only *fair* that the appellant refunds the dollar equivalent of the naira, which the respondent paid' – *Pan African Bank Ltd v Ede* (1998) 7 NWLR 422, 437 (Tobi JCA as he then was), emphasis added. 'It seems to me that the award of ₦21,717.48 to the plaintiff/cross-appellant in the circumstances of this case is grossly unfair' – *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619, 643 (Oguntade JSC).

[74] (2011) 13 NWLR 321.

[75] ibid.

In reality, the above judicial statements are another way of saying that the award of foreign currency judgments promotes the sound administration of justice in appropriate cases.

B. Can a Foreign Currency Judgment be Awarded as a Matter of Course?

It is submitted that foreign currency judgments are not awarded as a matter of course. The claimant must advance good reasons why it should be awarded a foreign currency judgment. Therefore, cases where Nigerian courts awarded foreign currency judgments without good reasons were decided *per incuriam*. There are Supreme Court authorities that support this position.

Iguh JSC, who appears to have been the first Supreme Court Justice to hold that Nigerian courts can award foreign currency judgments, consistently stressed in two cases that it was only in 'appropriate cases' that Nigerian courts could award foreign currency judgments.[76] Onu JSC, in his leading judgment in *Koya*, expressed the view that the issue as to whether a Nigerian court can grant a foreign currency judgment is a matter of 'discretion'.[77] Ogbuagu JSC, in his concurring judgment in *Afribank*,[78] also expressed a similar view.

Oguntade JSC, in his leading judgment in *Afribank*,[79] interpreted the Supreme Court's position to mean that Nigerian courts could give judgments in foreign currency 'if the facts so justified.'[80]

Mohammed JSC, in his concurring judgment in *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd*,[81] similarly held that 'it is no longer in doubt and this is settled that parties can make an arrangement or enter into a contract, to pay in foreign currency and a Nigerian court can in its discretion award same accordingly.'[82]

[76] *Broadline Enterprises Ltd v Monetary Maritime Corporation* (1995) 9 NWLR (Pt. 417) 1, 30; *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 292. Cited with approval in *Wema Bank Plc v Linton Industrial Trading Nigeria Ltd* (2011) 6 NWLR 479, 511 Saulawa JCA – 'It is a well settled principle of law, that Nigerian courts have jurisdiction to entertain and determine cases in which foreign currencies are claimed. Thus, in appropriate cases, the courts have the jurisdictional competence or power to enter judgment in the foreign currency claimed.'

[77] 'As to whether a Nigerian court could give judgment in foreign currency … I need only add that that question is not an issue of jurisdiction but rather that of discretion' – *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 267. See also *Adedoyin v Igbobi Development Company Ltd* (2014) LPELR-22994 (CA) 1, 17 – 'It is no longer in doubt and this is settled that parties can make an agreement or enter into a contract to pay in foreign currency and a Nigerian court can, in its discretion, award same accordingly.'

[78] (2006) 5 NWLR 619, 656.

[79] ibid, 644.

[80] *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619, 622.

[81] (2010) 11 NWLR (Pt. 1206) 589.

[82] *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR (Pt. 1206) 589. See also *Adedoyin v Igbobi Development Company Ltd* (2014) LPELR-22994 (CA) 1, 17 (Oseji JCA).

In *First Bank of Nigeria Plc v Ozokwere*,[83] Onnoghen JSC, in applying the relevant Supreme Court authorities, confirmed the position that '[i]t is … settled law that foreign currency judgments are within the general jurisdiction of the courts of law in Nigeria depending on the facts of the cases.'[84]

It is impossible to provide an exhaustive list of the factors that lead a Nigerian court to award a foreign currency judgment. It is, however, submitted that where the parties make an agreement for payment to be made in foreign currency, or the parties' dispute has its closest connection with a foreign currency, it would be appropriate for the Nigerian courts to award the judgment in that foreign currency. With this in mind, it is submitted that the Supreme Court's decision in *Harka Air Service (Nig) Ltd v Keazor*[85] is open to question. In *Keazor*, the plaintiff-respondent was a passenger on board the defendant-appellant's aircraft from Kaduna to Lagos. There was bad weather close to the point of destination, leading other airlines to cancel their flights. The plaintiff-respondent alleged that the flight to Lagos was turbulent; he suffered injuries and bodily pain, he lost his hand luggage and personal items; he was later treated at the hospital where he sought medical treatment, but the injuries he suffered curtailed his day-to-day activities, and he suffered loss professionally and financially.

The plaintiff-respondent sued the defendant-appellant at the Federal High Court for willful misconduct and claimed the sum of US$11,000.00 as general and special damages. The trial court found for the plaintiff-respondent, but awarded the sum of ₦1,257,840.00 as general and special damages and the cost of the action. The defendant-appellant was dissatisfied with the decision and appealed to the Court of Appeal, which also held in favour of plaintiff-respondent, but held (on his cross-appeal) that the trial court erred when it awarded the plaintiff-respondent damages in Naira when his claim was in US Dollars. The Court of Appeal awarded the sum of US$11,000.00 as general damages and set aside the award of special damages made by the trial court on the ground that it was not proved. The defendant-appellant further appealed to the Supreme Court, *inter alia*, challenging the Court of Appeal's award of US$11,000.00 in general damages. The Supreme Court unanimously dismissed the appeal. Interestingly, Adekeye JSC, in her leading judgment, rightly held that 'there are cases to support that the courts, in appropriate cases, have power to enter judgment in favour of a party in any foreign currency claimed.'[86] It is, however, submitted that the Supreme Court in *Keazor* did not apply the law correctly to the facts of the case.

The reason why the decision in *Keazor* is open to question is that on the facts of the case, there was no good reason why the Nigerian Court of Appeal and the Supreme Court awarded a foreign currency judgment. In this respect, the trial court was right to have awarded the sum in Naira. The dispute clearly had its closest

[83] (2014) 3 NWLR 439.
[84] *First Bank of Nigeria Plc v Ozokwere* (2014) 3 NWLR 439, 464.
[85] (2011) 13 NWLR 320.
[86] *Harka Air Services (Nig) Ltd v Keazor* (2011) 13 NWLR 320, 355.

connection with Nigeria, there was no evidence that the plaintiff-respondent purchased his ticket in US Dollars (or that the parties agreed for their payment to be in that currency), nor was there evidence provided that the plaintiff-respondent suffered his loss in US Dollars (such as his treatment being in a foreign hospital where he made payment in dollars). Indeed, to borrow the words of Tobi JSC, there was a lack of 'foreign exchange content'[87] in this case.

In addition, it was not 'fair and just'[88] to award a foreign currency judgment on the facts of this case. Admittedly, the plaintiff-respondent's case attracts much sympathy, but justice and legal certainty would have been better served in this case if the award had been made in Naira, as the trial court did, since the dispute appears to have had its closest connection with Naira in the absence of evidence to the contrary. What is fair and just should not be promoting the interest of the claimant at the expense of the defendant. In other words, the award of a foreign currency judgment is not aimed at making the claimant richer or poorer, nor is it aimed at punishing the defendant. The award of damages in foreign currency should not be used as a means to circumvent the fundamental principle of *restitutio in integrum*, that damages should put the innocent party in the position he would have been in had the contract been performed – not in a better position.

It is not submitted that a Nigerian court cannot award a foreign currency judgment where the parties involved are Nigerians, or where the transaction is situated in Nigeria. Indeed, in a later case, it has been rightly held by the Court of Appeal that 'the fact that a business transaction was entered into in Nigeria does not preclude the application of foreign currency or the court awarding same if it is part of the transaction.'[89] What is being said is that the claimant must *justify* why it is claiming in foreign currency instead of the Naira. This hurdle must be placed at the doorstep of the claimant before the court can, in its discretion, award a foreign currency judgment.

The Supreme Court's approach in *Keazor*, if left unguarded, could be seen in the future as promoting the award of foreign currency judgments in Nigeria without good reasons, at the expense of the Naira. It is submitted that, although the likes of Ogundare JSC in *Koya* and Anyaegbunam P in *Tankereederi* were concerned with promoting international commercial transactions in justifying the award of foreign currency judgments in Nigeria, it does not appear that if these judges were asked whether foreign currency judgments could be awarded *as a matter of course*, they would have answered in the affirmative. Indeed, Uwaifo JCA (as he then was) in *Melwani* and Akanbi JCA (as he then was) in *Koya*, though overruled by the Supreme Court, had good intentions in protecting the Naira against depreciation, and, by extension, protecting Nigeria's economy – liberally awarding foreign

[87] *Afribank Nigeria Plc v Akwara* (2006) 5 NWLR 619, 650.
[88] *Harka Air Service (Nig) Ltd v Keazor* (2011) 13 NWLR 320, 355 (Rhodes-Vivour JSC).
[89] *Adedoyin v Igbobi Development Company Ltd* (2014) LPELR-22994 (CA) 1, 17. See also *Teju Investment and Property Co Ltd v SUBAIR* (2016) LPELR-40087 (CA), affirming this decision.

currency judgments without good reason is not a policy approach that Nigerian courts should adopt.

IV. Foreign Currency Conversion

A very significant issue is the time at which a foreign currency should be converted, if conversion of foreign currency is mandatory. Various suggestions exist, such as at the time of entering into the contract, the time of breach, the time judgment is awarded, or the time of payment or execution of the judgment. These issues are of immense practical significance to the parties due to fluctuations in foreign currency exchange rates. It has rightly been submitted by Black, a leading authority on the subject, that '[a] fixed, predictable conversion date promotes settlement and affords litigants the ability to hedge if they wish to avoid the effects of the assessment of damages in a given national currency'.[90]

This section discusses whether conversion of foreign currency to Naira is mandatory in the award of foreign currency judgments, the criteria Nigerian courts apply where conversion of foreign currency to Naira is required, the authority responsible for determining the conversion rate of foreign currency to Naira where conversion is required, and whether it is possible for a court to amend its own judgment where it makes a clerical or arithmetic mistake in the conversion of foreign currency to Naira.

A. Is Conversion of Foreign Currency to Naira Mandatory?

Nigerian appellate judges have provided varied responses on the issue of whether conversion of foreign currency to Naira is mandatory. It is submitted that the current and accurate position of the law in Nigeria is that conversion of foreign currency to Naira is *not* mandatory. In this regard, the relevant case law is discussed and analysed below, and then a summary is made on what the position of the law is in Nigeria.

It appears the first appellate decision that addressed this issue is the unanimous decision of the Court of Appeal in *United Bank for Africa v Koya*.[91] Akanbi JCA (as he then was) held that a claimant that transacts in foreign currency must, in any subsequent suit arising from that transaction, claim in Naira. It is the duty of the claimant to adduce evidence to that effect and the duty of the court to give judgment in local currency.[92] Akanbi JCA's judgment, in reality, was no different from the old position in Nigeria that a transaction in foreign currency must be

[90] V Black, *Foreign Currency Claims in the Conflict of Laws* (Oxford, Hart Publishing, 2010) 5.
[91] (Unreported) delivered on 1 September 1988 cited in *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 279.
[92] ibid.

expressed in Naira (*Aluminium Industries*), nor was it different from the old position in England that a foreign currency judgment must be expressed in Pounds Sterling (*Havana*). In other words, it is a different way of saying that Nigerian courts cannot award foreign currency judgments. Indeed, this explains why Uwaifo JCA, in *Melwani*, approved this judicial statement as a basis for the view that Nigerian courts cannot award foreign currency judgments, but on the contrary, Ogundare JSC, in *Koya*, disapproved of this judicial statement.

However, in *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S*,[93] the Court of Appeal held that a claimant is entitled to make its claim in either the local currency or in foreign currency if the basis of the contract between the parties, sought to be enforced by order of specific performance, is in foreign currency.[94] In other words, it could be inferred that the Court of Appeal regarded the issue of conversion as one that is at the discretion of the claimant or judgment-creditor when making its claim before the Nigerian court. Also, in *United Bank for Africa Ltd v Ibhafidon*,[95] the Court of Appeal unanimously held that if the plaintiff claims in foreign currency, the court should also award judgment in foreign currency where the parties' transaction was predicated on the foreign currency in question.

At the Supreme Court, Wali JSC, in *Union Bank of Nigeria Ltd v Odusote Bookstores Ltd*,[96] expressed the view that Nigerian courts should reject foreign claims not expressed in local currency so that where the parties' transaction is in foreign currency, the judgment-debtor should provide the Naira equivalent to satisfy the judgment debt.[97] Again, this was another way of saying that a Nigerian court should only give judgment in Naira where the transaction is in foreign currency (which is a re-statement of the old law in Nigeria).

Akpabio JCA, however, delivering the leading judgment of the Court of Appeal in *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* ('*Aridi*'),[98] later held that:

> as a matter of law, if the claim of a Plaintiff was in a foreign currency (which the Court has power to do), execution should also be carried out in the said same foreign currency, and it is only a matter of grace or special dispensation that a judgment debtor can be allowed to pay his foreign debt in local currency.[99]

Also, in *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd*,[100] Ayoola JSC observed in *obiter* that the current practice in Nigeria is that foreign currency

[93] (1992) 4 NWLR 361.
[94] Cited with approval in *Pan African Bank Ltd v Ede* (1998) 7 NWLR 422.
[95] (1994) 1 NWLR 90.
[96] (1994) 3 NWLR (Pt. 331) 129.
[97] Cited with approval in *Savannah Bank (Nig) Ltd v Starite Industries Overseas Corporation* (2001) 1 NWLR 194, 210–11. See also *Momah v VAB Petroleum Inc* (2000) 4 NWLR 534.
[98] (1996) 7 NWLR (Pt. 459) 192.
[99] *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192, 201–2. Cited with approval in *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157, 179 (Akpabio JCA); *Anyaorah v Anyaorah* (2001) 7 NWLR 158, 175 (Akpabio JCA). See also *United Bank for Africa Ltd v Ibhafidon* (1994) 1 NWLR 90.
[100] (2001) 11 WRN 179.

judgments could either require the judgment-debtor to pay in the foreign currency or the Naira equivalent.[101] In other words, the conversion of foreign currency to Naira is not mandatory.

However, in *Nwankwo v Ecumenical Development Co Society* ('*Nwankwo*'),[102] Olagunju JCA (as he then was), in a concurring judgment at the Court of Appeal, observed that Nigerian courts have the power and jurisdiction to enter judgment in favour of a party in the foreign currency claimed, but the payment of the judgment debt to the victorious party must be at the relevant exchange rate of the Naira.[103]

The Court of Appeal, in later cases, did not apply the approach in *Nwankwo*. Thus, in *Erik Emborg Export v Jos International Breweries Plc*,[104] it held that if the claim of a plaintiff is in foreign currency, the judgment ought to be in that foreign currency or its local currency equivalent if the court so wishes, or if the parties agree that the debt be paid in the local currency.[105] In *BB Apugo & Sons Ltd v Orthopaedic Hospitals Management Board*,[106] in upholding the decision of the trial court that gave judgment in Pounds Sterling, Adekeye JCA (as she then was) held that payment to the plaintiff-respondent could be made in Pounds Sterling or the Naira equivalent.[107] In other words, at any point in time, conversion to Naira is not mandatory. In *Harka Air Services (Nig) Ltd v Keazor*,[108] the Court of Appeal concluded that:

> The present practice is that where an award is made in foreign currency, the judgment will be for payment of the amount in foreign currency or its Naira equivalent converted for the purpose of enforcement at the time of payment.[109]

In *Aluminium Manufacturing Company of Nigeria Ltd v Volkswagen of Nigeria Ltd*,[110] Nwodo JCA held that Nigerian '… courts can enter judgment in foreign currency once it has been established that such a payment was made. It is my firm view that if the claim is in Naira as an alternative the same can be so ordered.'[111]

[101] *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 197.
[102] (2002) 1 NWLR 513.
[103] *Nwankwo v Ecumenical Development Co Society* (2002) 1 NWLR 513, 543. The Supreme Court, in *Nwankwo, v Ecumenical Development Co Society* dismissed the appeal but made no comment on this judicial statement: (http://www.nigeria-law.org/Chief%20Peter%20Amadi%20Nwankwo%20&%20Anor%20v%20Ecumenical%20Development%20Co-Operative%20Society%20(EDCS)%20U.A.htm).
[104] (2003) 5 NWLR 505.
[105] *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505, 533.
[106] (2005) 17 NWLR 305.
[107] See also *Harka Air Services (Nig) Ltd v Keazor* (2006) 1 NWLR 160.
[108] (2006) 1 NWLR 160.
[109] *Harka Air Services Ltd (Nig) v Keazor* (2006) 1 NWLR 160, 194.
[110] (2010) LPELR-3759(CA).
[111] *Aluminium Manufacturing Company of Nigeria Ltd v Volkswagen of Nigeria Ltd* (2010) LPELR-3759 (CA) 49.

In *Afribank*,[112] the Supreme Court held that where a claimant makes a claim in foreign currency and the court upholds the claim in foreign currency, the court's judgment ought to be expressed in foreign currency - so that the Court of Appeal, in the circumstances of this case, was wrong to have awarded the claimant the Naira equivalent after upholding its claim in foreign currency. The Supreme Court, in other recent cases, has not deviated from the approach in *Afribank*.[113]

Based on the above analysis of the case law authorities, it is submitted here that it is not mandatory for the claimant to convert a foreign currency transaction to Naira before suing in the Nigerian courts. It is also not mandatory for Nigerian courts to award the foreign currency judgment in the Naira equivalent or to order that its payment or execution be made in Naira. If the claimant makes its claim in foreign currency, and the court finds it appropriate in its discretion to award a foreign currency judgment, the court should ordinarily award the judgment sum in foreign currency and not in Naira. However, the court, in its discretion, can order the conversion of a foreign currency claim to its Naira equivalent where the parties agree, the claimant makes its claim in the Naira equivalent, or the judgment-creditor wants its judgment in foreign currency converted to Naira for the purposes of execution.

B. Time of Conversion of Foreign Currency

In judicial proceedings, the time of conversion of the foreign currency to Naira used by the court is a significant issue. Different conversion rates could apply, such as the date the debt has arisen and become due, or the date the action has accrued, or at the time of entering judgment in the matter, or at the prevailing exchange rate at the time of enforcing the judgment. The choice of any of these dates for the purposes of conversion could have a significant impact on the parties' financial fortunes.

In the past, the claimant was obliged to convert its claim to Naira before suing, or to sue in the foreign currency and provide a Naira equivalent as well,[114] or the trial court, in its discretion, may convert the foreign currency to Naira as at the date of the judgment of the court.[115] In other words, the claimant was actually obliged to convert the foreign currency to Naira before suing. As stated earlier, this is no longer good law in Nigeria.

[112] (2006) 1 NWLR 160.

[113] *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd* (2010) 11 NWLR 589; *Harka Air Services (Nig) Ltd v Keazor* (2011) 13 NWLR 320; *First Bank of Nigeria Plc v Ozokwere* (2014) 3 NWLR 439, 464.

[114] *United Bank for Africa v Koya* (CA/I/106/87, Unreported) cited in *Koya v United Bank for Africa Ltd* (1997) 1 NWLR 251, 279; *Union Bank of Nigeria Ltd v Odusote Bookstores Ltd* (1994) 3 NWLR (Pt. 331) 129; *Savannah Bank (Nig) Ltd v Starite Industries Overseas Corporation* (2001) 1 NWLR 194, 210–11.

[115] *Savannah Bank (Nig) Ltd v Starite Industries Overseas Corporation* (2001) 1 NWLR 194, 211.

In Nigeria, the time of conversion is the time of execution of the judgment or payment of the judgment sum, at the prevailing rate of exchange.[116] This is also called 'the date of payment rule'. Black, who supports the date of payment rule, elaborately submits that its advantage is that:

> it diminishes the number of cases in which a foreign currency creditor will during litigation be subjected to a currency-fluctuation different from that it bargained for. Consequently, it reduces the situations those creditors will want to enter into transactions to hedge those risks. It is thus fair to the claimants and no less fair to the defendants. Bolstering this is the fact that reduction brings those risks into line with those that a creditor in a domestic currency is typically forced to confront, so foreign creditors are treated the same way as domestic ones. To this can now be added the increased fairness (due to increased certainty) to defendants in multi-forum cases, where in effect the old breach-date rule gave some creditors the advantage of selecting their currency of judgment in light of post-breach fluctuations.[117]

It appears that the first appellate decision of the Nigerian court that addressed the issue of the applicable time of conversion of the prevailing exchange rate of a foreign currency to Naira is the *Aridi* case.[118] In *Aridi*, the plaintiff-appellant sued the defendant-respondent in the High Court of Edo State claiming the sum of DM 494,968.49, plus interest at 10% per cent the price of 400 tons of nail-wire sold and delivered to the defendant-respondent in 1981. Judgment was ultimately given in favour of the plaintiff-appellant in the sum of DM 494,968.49, equivalent to ₦149,086.89 plus interest and other expenses, thus totalling DM 765,334 on 22 May 1986. The plaintiff-appellant did not take steps, however, to execute the judgment until sometime in May 1987, when the second-tier Foreign Exchange Market was introduced. In this new Foreign Exchange Market, the value of the Naira, which should have been equivalent to DM 765,334.00, became ₦338,793.27 instead of ₦299,052.86. Following a disagreement between counsel for the plaintiff-appellant and the Registrar of the High Court as to which rate to use in executing the judgment, an originating summons was filed before Amissah J to resolve the matter. Amissah J refused to alter the judgment of Gbemudu J, who delivered the original judgment, stating that he could not sit on appeal over a judgment of his learned brother of a coordinate jurisdiction. On appeal, the Court of Appeal unanimously allowed the appeal. Akpabio JCA, in his leading judgment, applied a commercially pragmatic approach when he held that:

> as a matter of law, if the claim of a Plaintiff was in a foreign currency (which the Court has power to do), execution should also be carried out in the said same foreign

[116] *Olaogun Enterprises Ltd v Saeby Jernstoberi Maskinfabric A/S* (1992) 4 NWLR 361, 385 (Salami JCA as he then was); *United Bank for Africa Ltd v Ibhafidon* (1994) 1 NWLR 90, 124–25 (Akpabio JCA); *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192; *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157, 178–79; *Anyaorah v Anyaorah* (2001) 7 NWLR 158, 175 (Akpabio JCA); *Saeby Jernstoberi Maskinfabric A/S v Olaogun Enterprises Ltd* (2001) 11 WRN 179, 196–97 (Ayoola JSC); *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505; *Harka Air Services (Nig) Ltd v Keazor* (2006) 1 NWLR 160.

[117] V Black, *Foreign Currency Claims in the Conflict of Laws* (Oxford, Hart Publishing, 2010) 82.

[118] *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192.

> currency, and it is only a matter of grace or special dispensation that a judgment debtor can be allowed to pay his foreign debt in local currency. And if that is to be done, it has to be at the rate of exchange applicable on the date of exchange (i.e at the date on which the execution is sought to be levied). In the instant case therefore, if as a matter of convenience, the debtor wishes to pay in local currency, with the concurrence of the judgment creditor, the exchange rate must be available on the date of exchange or conversion. That is so because a Bank or 'bureau de change' can only sell or buy foreign currencies at the rate prevailing on the date of exchange.[119]

In *Salzgitter Stahl GmbH v Tunji Dosumu Industries Ltd*,[120] one of the issues raised for consideration at the Supreme Court was whether the court should follow the old approach of the English courts, which mandated the claimant to convert its foreign currency to local currency before suing (*Havana*), or follow the current approach in England that required conversion to be done at the prevailing exchange rate (*Miliangos*). The Supreme Court unanimously adopted the latter approach. In *Tunji*, the plaintiff, a German export company claimed against the defendant, a Nigerian manufacturer, in the Lagos High Court for the sum of DM 127,305.49, or the Naira equivalent of ₦34,689.91. The plaintiff claimed DM 127,305.49 as the value of goods that the defendant failed to pay for. However, the plaintiff subsequently amended its statement of claim to read the Naira equivalent of the foreign currency it was claiming as ₦256,005.33. At the conclusion of the proceedings, the trial court, *inter alia*, granted the claimant its prayers in the sum of DM 127,305.49, or its Naira equivalent in the sum of ₦256,005.33. On appeal, the Court of Appeal, by a majority, reversed the trial court's judgment on the basis that the trial court should have applied the conversion rate as at the time the debt arose and became due. The plaintiff appealed to the Supreme Court, which unanimously allowed the appeal.

Chukwuma-Eneh JSC delivered the leading judgment. In analysing the issue, he considered the various approaches the court could adopt, such as basing the conversion rate on the date the debt has arisen and become due, the date the action has accrued, the time of entering judgment in the matter, or the prevailing exchange rate at the time of executing the judgment. Chukwuma-Eneh JSC preferred to adopt the prevailing exchange rate at the time of executing the judgment on the ground that it better promotes justice and advances the needs of international commercial transactions.

Where the parties conduct their transaction in foreign currency but agree to make payment in Naira, the basis of payment remains denominated in foreign currency so that the judgment-creditor is still entitled to judgment at the prevailing exchange rate at the date of execution of the judgment (or payment of the judgment sum). Thus, in the case of *Erik Emborg Export v Jos International Breweries Plc*,[121]

[119] *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192, 201–2. Cited with approval in *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157, 178–79 (Akpabio JCA); *Anyaorah v Anyaorah* (2001) 7 NWLR 158, 175 (Akpabio JCA).

[120] (2010) 11 NWLR (Pt. 1206) 589.

[121] (2003) 5 NWLR 505.

the first and second plaintiff-appellants were companies registered in Denmark. The third plaintiff-appellant was the Managing Director of the first and second plaintiff-appellants. Between 1978 and 1979, the plaintiff-appellants, upon request by the defendant-respondent, supplied the defendant-respondent with a quantity of malt and hops on credit in the total sum of DM 159,03.31. However, the defendant-respondent defaulted on its payments to the plaintiff-appellants despite their repeated demands.

In 1989, the plaintiff-appellant agreed to accept payment in Naira as opposed to the original agreement for payment in foreign currency. The defendant-respondent then paid the sum of ₦266,752.47, which, at the then prevailing exchange rate of ₦4.48 to a Deutsche Mark, amounted to DM 65,987.35. In 1994, the defendant-respondent paid the further sum of ₦817,180.00, which, at the then applicable autonomous exchange rate of ₦60.00 to Deutsche Mark, amounted to DM 13,619.66, leaving a total outstanding balance of DM 80,267.75.

When the defendant-respondent failed to pay the outstanding debt to the plaintiff-appellant, the plaintiff-appellant instituted an action at the High Court of Plateau State, Jos claiming payment of the sum of DM 80,267.75. The plaintiff-appellant, in the alternative, claimed the equivalent Naira of the sum of DM 80,267.75 at the exchange rate prevailing on the day of payment and the accumulated interest on the amount claimed. The trial gave judgment to the plaintiff-appellant in the sum of ₦182,240.41 with interest in its favour. However, the trial court awarded its judgment based on the exchange rate prevailing as at the time of the agreement between the parties, rather than the exchange rate prevailing on the day of payment of the judgment sum. The plaintiff-appellant was dissatisfied with this aspect of the trial court's judgment and appealed. The Court of Appeal unanimously allowed the appeal. Obadina JCA, in delivering the leading judgment, held that:

> What the parties agreed was that the payment due to the appellants by the respondent be made in naira currency at the rate of exchange as quoted by the Central Bank of Nigeria Plc on the day of payment. This agreement did not make the basis of payment due to the appellants become denominated in naira. Before the amount due in naira is determined, the amount due in deutsche marks must be known and the rate of exchange prevailing on the day of payment must be ascertained.[122]

Despite this, parties can agree to vary the decided mode of payment in relation to the currency of payment, and once that is done, the parties are bound by it and are barred from going back to the original agreement, since the court will enforce the new terms of the parties' contract.[123]

[122] *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505, 532–33.
[123] *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505.

C. What Authority Determines Conversion of a Foreign Currency to Naira?

The exchange rate of a foreign currency to Naira is a matter of fact which must be proved by evidence.[124] Where the conversion of foreign currency to Naira is in issue, ascertaining what authority determines the conversion rate of the foreign currency to Naira becomes significant, particularly where the defendant does not accept the claimant's conversion rate. In Nigeria, the Central Bank of Nigeria is empowered by statute to determine the exchange rate of the Naira from time to time.[125]

In relation to the award of foreign currency, Nigerian judges have also held that where the determination of the exchange rate becomes an issue, the courts are to apply the exchange rate as determined by the Central Bank.[126]

D. Amending a Foreign Currency Judgment

Judges are human beings and could make mistakes in calculating the conversion of foreign currency to Naira. This could be due to a clerical or arithmetical error. The issue is whether a Nigerian judge can amend its own judgment in such a circumstance, or whether the judge of a coordinate jurisdiction can do so, or must it be done on appeal for the first time?

Ordinarily, as a matter of procedure in Nigerian law, a judge who delivers a judgment cannot amend or review the judgment; it should generally be reviewed on appeal.[127] Such a judge is also said to be *functus-officio*. In the same vein, a judge of a coordinate jurisdiction cannot ordinarily amend or review such a judgment.[128] In both scenarios, such a judgment must be appealed against. However, arithmetical or clerical errors are one of the exceptional circumstances where the Nigerian court or a court of coordinate jurisdiction may amend its judgment; it does not have to be reviewed on appeal for the first time in such circumstances. The judgment-creditor could also appeal if it so desires, except that it is more convenient and less expensive to ask the court to amend an arithmetical error it made in its judgment than it is to file an appeal.

[124] *Harka Air Services (Nig) Ltd v Keazor* (2006) 1 NWLR 160, 186.

[125] Central Bank of Nigeria Act 2007 s 16.

[126] *Momah v VAB Petroleum Inc* (2000) 4 NWLR 534; *Erik Emborg Export v Jos International Breweries Plc* (2003) 5 NWLR 505, 535 (Obaidan JCA), 538–39 (Mangaji JCA). See also *Tankereederi Ahrenkiel GmbH v Adalma International Services Ltd* (1979) 2 FNLR 169, 177–78.

[127] See generally *Olurotimi v Ige* (1993) 8 NWLR (Pt. 311) 257.

[128] *Akporue v Okei* (1973) 12 SC 137; *Waghoreghor v Aghenghen* (1974) 1 SC 1; *Koden v Shidon* (1998) 10 NWLR (Pt. 571) 662.

In *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd*,[129] Akpabio JCA, in delivering the leading judgment of the Court of Appeal, held that:

> The learned trial Judge, Amissah, J should have given a directive to the High Court Registrar that the Naira equivalent of the judgment debt should be calculated based on the exchange rate prevailing on the date of payment regardless of whether it was higher or lower than that which prevailed on the date of judgment.

A court of law has inherent power to amend its own judgment to reflect its correct intention when it discovers that the judgment as drawn up does not correctly state what it actually decided and intended.[130]

In *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd*,[131] the Court of Appeal confirmed the correctness of its approach in *Aridi*. In *Union Bank*, the plaintiff-respondent, in a cross-appeal, complained about the Naira equivalent of US$566.250.00 on 19 May 1995. When the judgment of the trial court was released, it should have showed ₦45,300,000.00, at the rate of ₦80.00 to US$1.00, instead of ₦12,455,235.00. In other words, there was an outstanding balance of ₦32,844,765.00 payable to the plaintiff-respondent. However, this could not be done unless the judgment of the trial court was amended to show that the correct Naira equivalent of US$566.250.00 on 19 May 1995 was ₦45,300,000.00 and not ₦12,455,235.00, as erroneously stated in the judgment. Akpabio JCA, in delivering the leading judgment of the court, followed the decision in *Aridi* and amended the judgment of the trial court accordingly.[132]

V. Effect of Change in Foreign Currency Status as Legal Tender

Apart from fluctuations in foreign currency, it is well-known that foreign currencies could change as legal tender. Parties may originally have their agreement denominated in a currency that has since become obsolete at the time of judicial proceedings. For example, a significant number of Member State countries in the European Union have changed their currency to the Euro. In this regard, the questions that may arise are: what are the legal implications on the effect of a foreign currency change? Should the court award the judgment in the obsolete or the new foreign currency? Should the court exercise its discretion to convert the obsolete or the new foreign currency to Naira? Where the court converts the obsolete or new foreign currency to Naira, can the court still apply the criteria of the prevailing rate of exchange at the time of payment? These questions touch on practical

[129] (1996) 7 NWLR (Pt. 459) 192.
[130] *Salzgitter Stahl GmbH v Aridi Industries (Nig) Ltd* (1996) 7 NWLR (Pt. 459) 192, 201–2.
[131] (1997) 8 NWLR 157.
[132] *Union Bank of Nigeria Plc v Eskol Paints (Nig) Ltd* (1997) 8 NWLR 157, 183–84.

issues that may arise in judicial proceedings. It is only prudent for parties that have their original agreement denominated in an obsolete foreign currency to amend their agreement to reflect the change.

The most relevant case that addresses some of these issues is *Adedoyin v Igbobi Development Company Ltd* ('*Adedoyin*').[133] The principle in *Adedoyin* appears to be that where there is a change in foreign currency, the parties' agreement to pay remains denominated in the original currency at the prevailing rate of exchange at the time of payment.

In *Adedoyin*, the plaintiff-respondent leased a property in Lagos State to the Royal Insurance Company Limited by a lease agreement dated 13 February 1956 for a term of 99 years from November 1955 at a yearly rent of £200 and on agreement that Royal Insurance Company Limited shall erect dwelling houses on the Land. In 1956, Nigeria was still under British colonial rule and the British Pound was the medium of exchange and the official currency in Nigeria. This was so until Nigeria became independent in 1960 and a republic in 1963. The change to Naira took effect in 1973, and at the time, the value of the Naira was so strong that it was almost on par with the British Pound Sterling.

Subsequently, the defendant-appellant bought the residue of the lease (and a part of the property) by a deed of assignment dated 15 April 1967. There was a provision in the parties' agreement that the defendant-appellant should pay the sum of £100 as ground rent, being half of the £200 as per the original lease. The defendant-appellant paid the said sum to the plaintiff-respondent for a few years until the plaintiff-respondent wrote to the defendant-appellant for an upward review of the rent. The defendant-appellant refused to make this payment on the ground that the original lease agreement did not contain a provision for review of the rent throughout the term of the 99-year lease.

The plaintiff-respondent instituted an action against the defendant-appellant and claimed, *inter alia*, for arrears of the ground rent in respect of the leased property from January 2005 to the date and recovery of possession on the basis of a failure to pay the ground rent. There was evidence that the plaintiff-respondent was receiving Naira from the defendant-appellant from 1973, when the Naira became the legal tender in Nigeria. The trial court, in partially granting the claim of the plaintiff-respondent, held the following:

> I have looked very closely at Exhibit C1 [the lease agreement] which guided the relationship between the parties and there is no clause allowing the Claimant to review the ground rent. Having said that however, £100 is not ₦200 today! The Defendant cannot seriously expect to continue to pay ₦200 and say he is paying £100? If he is insisting on following strictly the Deed of Lease, he must pay £100 or its equivalent in Naira for all the outstanding years 2005 to date! What is fair is fair! … The prayer for recovery of possession for breach of the covenant to pay rent fails and is hereby dismissed. The Defendant shall pay the arrears of ground rent from 2005 till date in the sum of

[133] (2014) LPELR-22994 (CA) 1.

> £100 or the prevailing exchange rate for each of the years from 2005 till date. This is the prevailing exchange rate for each of the years from 2005 till date. This is the judgment of this court.[134]

On appeal, the Court of Appeal unanimously upheld the trial court's findings and approved the above-quoted judicial statement. In addition, Oseji JCA, in his leading judgment, held the following:

> To my mind, having strongly relied on Exhibit C1 [the lease agreement] to insist that there is no provision for an upward review of the rent payable annually on the said premises, he should as well be bound by the same agreement for the payment of £100 being part of the original sum of £200 agreed to in Exhibit C1 [the lease agreement] and this is to the effect that current and further payment of rent on the premises must reflect the value of the pound as at the time the agreement was executed. This to my mind is justice. The appellant should not be permitted to blow hot and cold at the same time. The same Exhibit C1 [lease agreement] which he depended upon to justify his non acceptance of an upward review of the annual rent as requested by the Respondent also made provision for payment of rent at the rate of £200 per annum. This was during the reign of British pounds in Nigeria which then was a British colony.[135]

In *Teju Investment and Property Co Ltd v SUBAIR* ('*Teju*'),[136] the Court of Appeal was invited to overrule or depart from its decision in *Adedoyin* on the basis that the provisions of Section 1(2) of the Decimal Currency Act[137] were not considered in *Adedoyin*. The Court of Appeal declined to overrule or depart from its decision in *Adedoyin*.

For background, the gist of the case as stated by Sankey JCA in *Teju* is as follows:

> The Respondent is the beneficial owner of the property lying and situate at No. 29 Taiwo Street, Lagos Island and covered by a Land Certificate with Title No. 0591 dated 19th February, 1951.? The Respondent's father, Pa Solomon Oshomoyo, had previously granted a Lease of the property to one Kamil Ismail in 1953 for a term of 70 years certain commencing from 1st April, 1953 and ending on 31st March, 2013, at an annual rent of 350 Pounds Sterling for the first 25 years and 450 Pounds Sterling for the remaining 45 years. Kamil transferred the Lease to VYB Company, which also transferred the Lease to Alberto Jose Miseri & Co. Subsequently, Alberto Jose also transferred the Lease to the Appellant. Pa Oshomoye died in 1997, and the last rent paid by the Appellant expired in December, 1999. The Appellant thereafter defaulted in paying rent. The Respondent commenced eviction processes against the Appellant through her Solicitors by a letter dated 9th November, 2010. As a result, by a letter dated 16th March, 2011, the Appellant forwarded cheques to the Respondent's Solicitors which were said to represent payment for all outstanding rents, as well as payment in advance for the un-expired residue of the Lease in Naira. However, by a letter dated 8th April, 2011, the Respondent's Solicitors

[134] Cited in *Adedoyin v Igbobi Development Company Ltd* (2014) LPELR-22994 (CA) 1, 8.
[135] *Adedoyin v Igbobi Development Company Ltd* (2014) LPELR-22994 (CA) 1, 19.
[136] (2016) LPELR-40087 (CA).
[137] Cap D2 LFN 2004.

rejected the money and returned all the cheques. The Respondent followed this up by filing an action before the Lower Court seeking payment of the arrears of rent, mesne profits and possession of premises.

The Respondent adduced evidence through two witnesses and the Appellant, who disputed the claim, presented its case through its sole witness. Judgment was subsequently entered in favour of the Respondent in these terms, inter alia, at pages 149–151 of the printed Record of Appeal:

> 'It is trite that every subsequent tenant takes from the terms of the head title on the property. To that extent therefore the Defendant's tenure on the property in issue can only be in accordance with the terms of the 1953 Lease to the original Lessee both parties were in tandem that rent was to be at the rate of 350 (Three Hundred and Fifty) Pounds Sterling for the first 25 years and thereafter at 450 (Four Hundred and Fifty) Pounds for the remainder of the Lease period. Accordingly, what is admitted need no further proof. The bone of contention on that now is in what currency that should continue to be paid. The claimant says in British Pounds Sterling, but the Defendant contended that by operation of the Decimal Currency Act (supra) that should now be in Naira. Without much ado I hold that that submission is misconceived, more particularly because Section 1(2) of the Act clearly provides for contracts or matters for which payment was to have been made in 'Nigerian Pounds' and concluded that to be on the basis that one Nigerian Pound equals Two Naira.' … Accordingly therefore I hold that that provision did not change the agreement of the parties (their privies inclusive) in this case under the 1953 Lease, that payment of rent thereunder shall be in pounds Sterling and I so hold …
>
> I therefore hold that Pounds Sterling is the currency of rent payment under the Lease and order that the Defendant shall pay rent themselves in Pounds Sterling. I therefore enter Judgment in favour of the Claimant in the sum of 450 (Four Hundred and Fifty) Pounds Sterling per annum from January 2000 till 31st December 2014, totaling 6750 (Six Thousand, Seven Hundred and Fifty) Pounds Sterling to be paid forthwith.'

Section 1(2) of the Decimal Currency Act provides that:

> Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing whatsoever relating to money or involving the payment of or the liability to pay any money which, but for this subsection, would have been deemed to be made, executed, entered into, done and had, in and in relation to Nigerian pounds shall in Nigeria be deemed instead to be made, executed, entered into, done and had, in and in relation to naira on the basis that one Nigerian pound equals two naira.

In construing Section 1(2) of the Decimal Currency Act, the Court of Appeal (Sankey JCA) in *Teju* held that:

> Applying the Golden/literal rule of interpretation, it is plain as light is to day that the provision relates only to contracts et al entered into 'in relation to Nigerian Pounds'. No other construction can be given to this provision without doing violence to it and to the spirit and intendment of the Law. It would certainly be stretching it too far and out of the bounds of the Law to suggest that parties to a contract had no freedom and latitude

> to decide for themselves the terms of their contracts, which could include the terms and manner of payment. It is certainly not the intention of the Lawmaker to constrain and constrict parties into a straitjacket when contracting with each other.
>
> It is incontrovertible that the Decimal Currency Act (supra) came into force for the purpose of establishing a decimal currency for Nigeria. That having been said, in cases where parties, of their own free-will, decide and agree that the currency of their contract shall be in Pounds Sterling, or for that matter, US Dollars, Euro, Francs, Riyadh [*sic*], Shillings, or the like, Section 1(2) of the Decimal Currency Act does not operate to limit, restrict or hinder them from doing so. The extent of the application of this provision is that, all transactions and contracts entered into before the coming into operation of the Act in 'Nigerian pounds', shall be deemed to have been done in relation to the Naira. This was clearly in order to facilitate the smooth change-over of the legal tender in Nigeria from the Nigerian Pounds to the Naira. The learned Trial Judge was therefore quite right when she found as she did that the provision was exclusively limited and confined to transactions made in relation to Nigerian Pounds …[138]

VI. Statutory Limitations on Awarding Foreign Currency Judgment

There are statutory limitations on the award of foreign currency judgments in Nigeria. The statutory limitation could exist on two main grounds. The first is that the court's jurisdiction to hear a dispute relating to a particular foreign currency transaction may be excluded by statute or the Constitution. The second is that the scope of the court's jurisdiction to award a foreign currency judgment may be strictly defined under statute. This section examines both issues.

A. The Jurisdictional Issue

A court cannot exercise jurisdiction in a matter in which it does not have jurisdiction to do so. For example, issues relating to the Foreign Exchange Market in Nigeria would usually attract a claim in foreign currency where a dispute arises.[139] In such a situation, it is the Federal High Court that has exclusive jurisdiction; the State High Court cannot assume jurisdiction to award a foreign currency judgment in this case.[140] Another practical example is that banking transactions

[138] *Teju Investment and Property Co Ltd v SUBAIR* (2016) LPELR-40087 (CA) 14–16.

[139] See generally The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap F34 (Decree No 17 of 1995) LFN 2004.

[140] Section 34 of The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap F34 (Decree No 17 of 1995) LFN 2004.

usually involve foreign exchange transactions as well. Section 251(1)(d) of the 1999 Constitution provides that the Federal High Court has exclusive jurisdiction to the exclusion of any other court in causes

> connected with banking, banks, other financial institutions, including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes, and other financial measures.

The proviso to Section 251(1)(d) of the 1999 Constitution provides, however, that the exclusive jurisdiction of the Federal High Court 'shall not apply to any dispute between the individual customer and his or her bank in respect of transactions between the individual customer and the bank.' The Supreme Court has interpreted the proviso to Section 251(1)(d) as an exception to the general rule that the Federal High Court has exclusive jurisdiction under Section 251(1)(d) in transactions involving an individual customer and his or her bank, so that in such cases, both the Federal and the State High Court can assume concurrent jurisdiction.[141]

Thus, the Supreme Court in *United Bank for Africa Plc v BTL Industries Ltd*[142] (*per* Onu JSC) held that:

> As the claim has nothing to do with monetary or fiscal policy of the Federal Government of Nigeria in the pleadings and evidence before the court the mere fact that the unit of account is foreign currency for which the respondent paid the Naira equivalent does not make it a foreign exchange matter. See *Oyegoke v. Iriguna* (2002) 5 NWLR (Pt. 760) 417 at 438 paras. F-G; H where the court held as follows: -
>
>> '… the subject matter in dispute i.e. exchange of foreign currency can at best be a subject matter of concurrent jurisdiction between the Federal High Court and a State High Court. I hold that the trial court had jurisdiction to determine the issue of exchange of foreign currencies.'
>
> Also, in NDIC v. FMB (1997) 2 NWLR (Pt. 490) 735 at 755 756 paras. H-A. It was held that [a] dispute between an individual customer and his bank in respect of transactions between them can hardly affect the vital interest of the Federal Government …[143]

B. Limitations on the Scope of Foreign Currency Award

There are statutes that exist in Nigeria that limit the ambit of the court's power in awarding foreign currency judgments. This work only focuses on what exists in the federal statutes in Nigeria and does not look into what exists under the

[141] *National Development Insurance Incorporation v Okem Enterprises Ltd* (2004) NWLR 10 (Pt. 880) 107; *United Bank for Africa Plc v BTL Industries Ltd* (2006) NWLR (Pt. 1013) 61.
[142] (2006) LPELR-3404 (SC).
[143] *United Bank for Africa Plc v BTL Industries Ltd* (2006) LPELR-3404 (SC) 41–42.

laws applicable in each of the States of the Federation. For example, the Nigerian Court of Appeal[144] once considered Sections 422 and 442 of the Contracts Law of Anambra State (the 'Contract Law'). Section 422 provides that damages recoverable under the Contract Law shall not be increased merely by reason of a decline in the value of money between the time at which loss is to be assessed and the date of the judgment. Section 442 provides that where damages for breach of contract are claimed, which are *prima facie* calculable in foreign currency, the amount claimed shall be converted into Nigerian currency as at the date of breach.

Under the federal statute, Section 17 of the Admiralty Jurisdiction Act (the 'AJA') contains the power of Nigerian courts to award foreign currency judgments as follows:

> (1) The Court shall have the power to give judgement in any monetary currency (accepted as legal tender by the laws of any other country) in which any of the parties has suffered loss or damage if-
>
> (a) the goods or consignment are paid for or are to be paid for in that foreign currency; or
>
> (b) the goods are insured in that currency and part of the amount so claimed is confined to that portion in foreign currency; or
>
> (c) the consideration or loss is derived from, accruing in, brought into or received, as the case may be, in the foreign currency or for the benefit of the party making a claim before the Court.
>
> (2) A judgement awarded by the Court in any foreign currency shall be recoverable as if it were a judgement of the Court awarded in the currency of Nigeria.

In reality, Section 17(1)(a)–(c) of the AJA applies the criteria of party autonomy and proximity in the award of foreign currency judgments. Section 17(2) is actually a provision relating to the mandatory conversion of foreign currency. It leaves, however, a gap, as it is not clear what criteria should be used in converting the foreign currency to Naira. It is submitted here that the criteria utilised under the Nigerian common law regime should apply with equal force with respect to the AJA. The criteria applied by Nigerian judges under the common law regime appear to meet the commercial expectation of international traders and promote practical justice.

Section 4(3) of the Foreign Judgments (Reciprocal Enforcement) Act 1960 (the '1960 Act')[145] also has a provision relating to foreign currency judgments for the purpose of registering a foreign judgment from a designated country. Section 4(3) of the 1960 Act provides that where the sum payable under a foreign judgment is to be registered in a foreign currency, the judgment shall be converted at an equivalent rate to Naira using the rate of exchange prevailing at the date of the judgment

[144] *Co-operative and Commerce Bank (Nig) Ltd v Onwuchekwa* (1998) 8 NWLR 375. The Court of Appeal, by a majority, did not award judgment in favour of the claimant in this case, so the consideration of the Contract Law of Anambra State was academic.

[145] Act No 31 of 1960, Cap F35 LFN 2010.

of the original court.[146] This provision has been criticised as obsolete and reflecting the old position that existed in England. Reform has also been suggested in this regard.

Part 1 of 1960 Act (comprising Sections 3 to 10 of the 1960 Act) is not applicable in the absence of an order of the Minister of Justice under Section 3 of the 1960 Act,[147] so the provisions of Section 4(3) of the 1960 Act are not applicable at the moment to the registration of foreign judgments in Nigeria.[148] It is the common law regime (relating to the award of foreign currency judgments) that applies under the 1922 Ordinance, which is currently applicable to the registration of foreign currency judgments.[149]

VII. Conclusion

This chapter has discussed foreign currency obligations in Nigeria. The chapter defined the meaning of foreign currency in Nigeria. It also reviewed the historical power of Nigerian courts to award foreign currency judgments at common law and concluded that the current approach in Nigeria recognises the power of the court to award foreign currency judgments. The legal bases for awarding foreign currency were discussed, and it was submitted that Nigerian judges justify the award of foreign currency judgments on four main grounds: party autonomy, proximity, *restitutio in integrum*, and the sound administration of justice. It was also on this basis that it was concluded that a foreign currency judgment cannot be awarded as a matter of course in Nigeria.

[146] Section 4(3) of the 1960 Act.

[147] *Macaulay v RZB Austria* (2003) 18 NWLR (Pt. 852) 28; *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622; *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1; *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606; *Mudasiru v Abdullahi* (2009) 17 NWLR 547; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50.

[148] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1.

[149] See also ibid.

11

Bills of Exchange

I. Introduction

In Nigeria, matters related to bills of exchange are governed by the Bills of Exchange Act ('BEA').[1] The BEA is inspired by the UK Bills of Exchange Act 1882. Nigeria is not a party to the United Nations Convention on International Bills of Exchange and International Promissory Notes 1988, or the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques of 19 March 1931, or the Geneva Convention on the Stamp Laws in connection with Bills of Exchange and Promissory Notes of 7 June 1930.

A bill of exchange is an unconditional order that is in writing, addressed by one person to another, signed by the person giving it, and requires that the person to whom it is addressed pay on demand, or at a fixed or determinable future time, a certain sum of money, or to the order of a specified person or bearer.[2]

A bill is clearly an instrument which from its nature is likely to give rise to private international law problems. A bill may be drawn in one country, eg Ghana; be accepted in another, eg Togo; be indorsed in a third, eg Benin; and be payable in a fourth, eg Nigeria. The law of each of these countries may affect the validity of the bill or of any one or more of the contracts contained in it, or the rights and obligations of the parties. As in the case of other contracts, it may be necessary to determine matters such as: the law governing the formation of the contract, the capacity of the parties, the formal and essential validity of the contract, and its interpretation.

The BEA does not address all private international law issues related to bills of exchange. The BEA is by no means an exhaustive codification of the conflict of laws with regard to bills. The BEA addresses issues of formal validity, interpretation, duties of the holder, the rate of exchange and date of payment.[3] These issues are the focus of this chapter. Although the conflicts rules in Section 72 of the BEA deal with bills, the provisions apply equally to promissory notes. This is because Section 91(1) provides that 'the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes'.

[1] Bills of Exchange Act, Cap 35 LFN 1990.
[2] ibid, s 3.
[3] ibid, s 72.

Potential private international law issues not addressed by the Act are governed by the common law. Section 97(2) of the BEA provides that 'the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques'. Thus, the common law choice of law rules will apply to matters such as capacity, essential validity, discharge, transfers, damages for dishonour, and interest.

Generally, the BEA excludes party autonomy in choice of law and emphasises the *lex loci contractus*. This is because negotiable instruments are intended to circulate, and the rights and obligations of parties should be plain on the face of the instrument. For the same reason, it would be inappropriate to provide for a single law to govern the issues arising out of a bill of exchange transaction.

II. Formal Validity

The validity of a bill, as it relates to requisites in form, is determined by the law of the place of issue. The validity, in relation to requisites in form of the supervening contracts such as acceptance, endorsement, or acceptance *supra* protest, is determined by the law of the place where such a contract was made.[4] This law governs all questions of form, including whether an endorsement is made in due form and whether the bill is unconditional.

Notwithstanding the preceding, the BEA provides that where a bill is issued outside Nigeria, it is not invalid solely because it is not stamped in accordance with the law of the place of issue.[5] The effect of this provision is that the failure to stamp a bill issued out of Nigeria in accordance with the foreign law prevailing at the place of issue does not invalidate the bill, even if that is the effect of the foreign law. This provision applies only to invalidity arising from the want of a stamp. It has no reference to any other cause of invalidity.

Also, where a bill issued out of Nigeria conforms, as it relates to requisites in form, to the law of Nigeria, it may, for the purpose of enforcing payment, be treated as valid as between all persons who negotiate, hold, or become parties to it in Nigeria.[6] This is to protect holders, who may rely on this exception if they prove that both they and the person against whom they seek to enforce payment became parties to the bill in Nigeria.

III. Interpretation

The interpretation of the drawing, endorsement, acceptance, or acceptance *supra* protest of a bill is determined by the law of the place where such a contract was

[4] ibid, s 72(a).
[5] ibid, s 72(a)(i).
[6] ibid, s 72(a)(ii).

made, but where an inland bill is endorsed in a foreign country, the endorsement shall be interpreted according to the law of Nigeria as regards the payer.[7]

IV. Duties of the Holder

The duties of the holder, with respect to presentment for acceptance or payment, and the necessity for, or sufficiency of, a protest or notice of dishonour (or otherwise), are determined by the law of the place where the act is performed or where the bill is dishonoured.[8]

V. Rate of Exchange and Maturity

Where a bill is drawn outside of, but is payable in Nigeria, and the sum payable is not expressed in the currency of Nigeria, the amount shall, in the absence of some expressed stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.[9] This provision only deals with the rate of exchange. It does not dictate payment in a particular currency. Thus, for example, a debtor may remit to the creditor enough Nigerian Naira that would produce the amount due at the said exchange rate.

Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.[10]

VI. A Call for Reforms

As discussed above, Section 72 of the BEA does not purport to address all private international law issues likely to arise in a transaction relating to a bill. Rather, Section 72 deals with five main subjects, namely, formal validity, interpretation, duties of the holder, the rate of exchange for bills drawn in foreign currency, and maturity. It has also been observed that Section 72 does not provide for a single governing law for all contracts related to a bill. Section 72 does not address issues such as capacity, essential validity, discharge, or the proprietary aspects of transferring bills. These issues are likely to be governed by the choice of law rules applicable to contracts and the transfer of movables. Further, the dearth of decided cases contributes to the uncertainty in this area. There is a need for legal and commercial certainty in this important area of the law. There is need to reform this area of the law, especially through legislation.

[7] ibid, s 72(b).
[8] ibid, s 72(c).
[9] ibid, s 72(d).
[10] ibid, s 72(e).

PART IV

Family

12

Marriage

I. Introduction

The institution of marriage – from its creation to dissolution – is a fertile ground for private international law problems. Persons of different domiciles, habitual residences, or nationalities may marry in a country that they happen to be in. In addition to marital relations between persons of the opposite sex, issues regarding same-sex relationships are increasingly being debated around the world. Indeed, some countries have enacted legislation in relation to the subject, including Nigeria. Marriage and the family law issues it engages are embedded with wider societal norms and values – accordingly, approaches to it differ from society to society. Thus, this is one area where a quest for uniformity may be misplaced.[1]

II. Nature of Marriage

Although it is not a purely private international law issue, the question of 'what is a marriage' often raises significant private international law problems. Marriage relates to a person's legal status; a number of private international law issues turn on it. Also, due to the pluralistic nature of the Nigerian legal system and its multiple sources of laws – statutory, common law, customary, and Islamic law – different laws may potentially dictate the nature of marriage. Prior to colonial rule, the predominant form of marriage in Nigeria was a polygamous, or potentially polygamous, form of marriage, which was governed by customary or Islamic law. The concept of statutory marriage in Nigeria is a by-product of British colonial rule.[2]

A statutory marriage (or 'monogamous marriage') is defined as 'a marriage which is recognised by the law of the place where it is contracted as a voluntary

[1] On marriage in Nigeria, see generally AB Kasumnu and JW Salacuse, *Nigerian Family Law* (London, Butterworths, 1966); RO Okagbue, *The Marriage Dilemma* (Enugu, Government Printers, 1975); SC Obi, *The Customary Law Manual* (Enugu, Government Press, 1977); EI Nwogugu, *Family Law in Nigeria*, 3rd edn (Revised Edition) (Heniman Studies in Nigerian Law, 2014); IO Agbede, 'Towards Evolving a Single Marriage Law in Nigeria: Prospects and Problems in the Conflict of Law' in O Ajai and T Ipaye (eds), *Rights of Women and Children in Divorce* (Lagos, Franked Publishers, 1997) 137–46; M Onokah, *Family Law* (Ibadan, Spectrum Books, 2003).

[2] See generally the cases of *Onikepe v Goncallo* (1900) 1 NLR 41; and *Adegbola v Johnson* (1921) 3 NLR 89.

union of one man and one woman to the exclusion of all others during the continuance of the marriage'.[3] A statutory marriage also includes a marriage celebrated in a licensed place of worship by a recognised Minister of a Church.[4] It excludes, however, Islamic or other customary law marriages.[5] In Nigerian law, a marriage is void if

> the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnisation of marriages.[6]

This provision codifies the common law principle that the formal validity of marriage is governed by the law of the place of celebration.

If a marriage between parties, one of whom is a citizen of Nigeria, is contracted in a country outside Nigeria before a marriage officer[7] in his office, it will be valid in law as if it had been contracted in Nigeria before a registrar in the registrar's office.[8] This provision enables a Nigerian to conclude a marriage recognised as valid in Nigerian law before Nigerian diplomats and consular officers abroad, even if such marriage may not have been validly celebrated in the foreign country.

Section 6(2) of the Matrimonial Causes Act provides that '[a] provision of this Act shall not affect the validity or invalidity of a marriage where it would not be in accordance with the rules of private international law to apply that provision in relation to that marriage'.[9] This provision is a triumph for private international law; it recognises that in claims involving a foreign element, it may not be appropriate to apply domestic law. In essence, the validity of a marriage involving a foreign element must be determined in accordance with the relevant rules of private international law.

Customary law and Islamic law marriages are valid in Nigeria.[10] These marriages are, by their nature, polygamous or potentially polygamous. A statutory marriage to another person is invalid where there was a previous customary law marriage.[11] Similarly, a customary law marriage to another person is invalid where there was a previous statutory marriage.[12] A violation of these provisions could attract criminal sanctions.[13]

[3] Interpretation Act, Cap 192 LFN 1990 s 18. See also Marriage Act, Cap 218 LFN 1990 ss 33 and 35; Matrimonial Causes Act, Cap M7 LFN 2010 ss 69 and 114(6).

[4] Marriage Act, Cap 218 LFN 1990 ss 21–29.

[5] Matrimonial Causes Act, Cap M7 LFN 2010 ss 69 and 114(6).

[6] Matrimonial Causes Act, Cap M7 LFN 2010 s 3(1)(c). See also *Anyaegbunam v Anyaegbunam* (1973) All NLR (Pt. I) 385.

[7] See Marriage Act, Cap 218 LFN 1990 s 50, which provides that 'for the purposes of this Act, every Nigerian diplomatic or consular officer of the rank of Secretary or above shall be regarded as a marriage officer in the country to which he is accredited'.

[8] Marriage Act, Cap 218 LFN 1990 s 49.

[9] Matrimonial Causes Act, Cap M7 LFN 2010 s 6(2).

[10] *Jadesimi v Okotie-Eboh* (1996) LPELR-SC.188/1992.

[11] Marriage Act, Cap 218 LFN 1990 s 33.

[12] ibid, s 35.

[13] ibid, s 39; Criminal Code, Cap 77 LFN 1990 s 370.

In the recent case of *Mgbodu v Mgbodu*,[14] the Court of Appeal (*per* Ogunwumiju JCA) elaborated on the implications of the interplay between customary law and statutory marriages where a marriage is polygamous. In *Mgbodu*, the plaintiff-respondent and defendant-appellant were half-brothers – products of a polygamous marriage. The deceased had first contracted a statutory marriage with the plaintiff-respondent's mother then contracted a customary law marriage with the defendant-appellant's mother. One of the issues for consideration was the validity of the second customary law marriage, which the defendant-appellant claimed was valid. Ogunwumiju JCA held as follows:

> Section 35 of the Marriage Act provides as follows: '35. Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under customary law; but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted.' (Underlining mine)
>
> The Appellant in this case has strenuously argued that the proviso hereinabove recognizes customary law despite a prior celebration of a statutory marriage. That couldn't be more wrong. The underlined phrase 'SAVE AS AFORESAID' which translates as 'EXCEPT AS STATED ABOVE' completely put paid to the erroneous arguments of the Appellant. Without much ado, what Section 35 simply means is that any marriage celebrated in accordance with customary law shall be valid notwithstanding anything contained in the Marriage Act EXCEPT where it is invalid by reason of the existence of a Statutory marriage before the said customary marriage. In other words, the only condition that can invalidate an otherwise proper marriage conducted in accordance with customary law is when one of the parties to the customary marriage was at the time the customary marriage was conducted, married to another person under the Marriage Act and the marriage was still subsisting.
>
> Let me say that while a subsequent Statutory marriage by or to a person who is either married under the Act or in accordance with Customary law is forbidden, subsequent marriage under the Act or in accordance with Native law and Custom is not forbidden under any law where the parties remain the same. In other words, where Mr. A marries Mrs. A in accordance with Native law and custom, they can proceed to conduct another marriage under the Act if they so wish and vice versa. However, during the pendency of either a marriage in accordance with Native law and custom or a marriage under the Act, Mr. A or Mrs. A cannot validly conduct any marriage with another person under the Act. This is the position of the law as provided in Section 33 (1) of the Marriage Act as follows:
>
>> '33. (1) No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person with whom such marriage is had …'[15]

[14] (2018) LPELR-43770 (CA).

[15] *Mgbodu v Mgbodu* (2018) LPELR-43770 (CA) 7–9.

Ogunwumiju JCA further held that:

> In effect, any customary marriage conducted with another person during the pendency of a Statutory marriage is invalid and void ab initio. As such, the purported marriage between the late Gregory Mgbodu and the mother of the Appellant did not only fail to exist in the eyes of the law, it amounted to an offence under the Act. Section 47 of the Marriage Act provides as follows: '47. Whoever, having contracted marriage under this Act, or any modification or re-enactment thereof, or under any enactment repealed by this Act, during the continuance of such marriage contracts a marriage in accordance with customary law, shall be liable to imprisonment for five years.'[16]

Two old cases also address the interplay between customary (or Islamic) law marriage and statutory marriage where there is an already existing marriage celebrated abroad or in Nigeria. In *Onikepe v Goncallo*,[17] a Christian marriage entered into in a Christian country – Brazil – by two professing Mohammedan natives who were sent there as slaves and had previously, in the same country, gone through a marriage ceremony according to Mohammedan rites, was held not to be binding on the parties on their return to Nigeria, as it is not a Christian country. Accordingly, the foreign marriage did not prevent the man from contracting a second Mohammedan marriage.

In *Adegbola v Johnson*,[18] Harry Johnson, alias Ajayi of Awe, in the mid-nineteenth century, married Oniketan according to native law and custom, by whom he had one daughter named Adegbola (the plaintiff). He was subsequently seized as a slave and shipped to the West Indies, where he lived for about 40 years, with his wife and children remaining at Awe. In the West Indies, Harry Johnson was converted to the Christian faith and became a member of the Roman Catholic Church. Prior to 1876, Harry Johnson married a woman, afterwards known as Mary Johnson, in a Catholic Church, and after living in the West Indies for some three years they came to Lagos and were received in the Roman Catholic Church. One of the ancillary issues that the court considered was the validity of Harry Johnson's Church marriage to Mary Johnson when he already had a subsisting marriage with Oniketan. Combe CJ, in typical colonial language of the time, held that:

> Although there is no direct evidence that the native polygamous marriage which Harry Johnson contracted before he was seized as a slave was dissolved, I think that the proper presumption on the facts is that Harry Johnson, before he contracted his marriage with Mary Johnson, considered that he and his partner to the native marriage were absolved from all obligations to one another founded on the native marriage, and that he was free to contract a Christian marriage with Mary Johnson. Harry Johnson had then been in the West Indies for some 35 years, separated from all these years from his pagan relations; he had changed his status in so far as he had adopted the Christian religion. Under the laws of the country in which he was living, and under which he may have

[16] *Mgbodu v Mgbodu* (2018) LPELR-43770 (CA) 12–22.
[17] (1900) 1 NLR 41.
[18] (1921) 3 NLR 89.

> considered he would live for the rest of his life, the polygamous marriage which he had contracted many years before did not preclude him from contracting a Christian marriage. Had he been at Awe he could have dissolved his native marriage with but few, if any, formalities, and he very possibly thought that his pagan wife, if still alive and being deprived of his support, had married someone else or had been taken by his brother as a wife, his relations assuming, as they might well have done, that he was dead. In these circumstances, I consider that the presumption in favour of a Christian marriage between Harry and Mary Johnson must be made and that such presumption has not been rebutted.[19]

Parties in Nigeria sometimes marry under two different systems of law – customary (Islamic or religious) law and marriage under the statute. This usually occurs where the parties celebrate a marriage under customary law, and then (the same parties) celebrate a marriage under the Marriage Act.

Marriage under two systems of law by the same parties is referred to as a dual marriage or a 'double-decker marriage'.[20] The main rationale that can be proffered for double-decker marriages is the desire of the parties to honour their local customs and also obtain the benefits under the provisions of the statute. Such marriages, however, raise some significant legal questions: How is this type of marriage to be classified? Is it a statutory marriage or a customary law marriage? What law governs a dual marriage? Should different laws apply to a dual marriage? This is a difficult internal conflict of laws problem, which arises from the plurality of laws applicable to dual marriages in Nigeria.

Jadesimi v Okotie-Eboh ('*Jadesimi*')[21] illustrates how legally problematic double-decker marriages can be. In *Jadesimi*, the deceased (Late Chief Festus Okotie-Eboh) married the first respondent according to Itsekiri native law and custom. He married the same person once again, this time under the Marriage Act. Before the second marriage, the deceased made a will. The main issue before the Supreme Court was whether the second marriage revoked the will within the meaning of Section 18 of the Wills Act 1837.[22] The Supreme Court unanimously answered the question in the negative. Uwais CJN, in delivering the leading judgment, held that:

> It is a matter of common knowledge that most people in Nigeria who contract marriages under the Marriage Act, undergo a form of customary marriage as a matter of

[19] *Adegbola v Johnson* (1921) 3 NLR 81, 83–84 (Combe C.J).

[20] For a detailed analysis on the subject, see OG Temitope, 'Double-Decker Marriage in Nigeria: Issues, Problems and Solutions' – https://www.unilorin.edu.ng/studproj/law/0640ia136.pdf. See also IO Agbede, 'Towards Evolving a Single Marriage Law in Nigeria: Prospects and Problems in the Conflict of Law' in O Ajai and T Ipaye (eds), *Right of Women and Children in Divorce* (Lagos, Franked Publishers, 1997) 137–46.

[21] (1996) LPELR-SC 188/1992.

[22] Section 18 of the Wills Act 1837 (as originally enacted) provides that 'Every will made by a man or woman shall be revoked by his or her marriage except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator or the person entitled as his or her next of kin under any written law relating to the distribution of the estate of persons dying intestate.'

> practice and adherence to the custom of their forefathers. Some refer to such practice as 'traditional engagement' while other simply refer to it as solemnization of customary marriage. It is never intended by the practice that the marriage under the Marriage Act should nullify the customary marriage or engagement but rather that it would supplement the practice or custom.[23]

Iguh JSC, in his concurring judgment, also rightly held that:

> No doubt, under section 18 of the Wills Act, 1837 of England, the marriage which can revoke or invalidate an existing Will of either of the parties, is a marriage within the English concept. This connotes a marriage between a man and a woman each of whom at the time of the marriage was unmarried or free to get married and therefore possessed the legal capacity to contract a lawful marriage. In my view however, the marriage contemplated under section 18 of the Wills Act, 1837 cannot conceivably include a subsequent marriage under the Marriage Act, Cap. 155 between a man and a woman who are already validly married under customary law and living together as husband and wife before either of them made his last Will and Testament and after which the subsequent marriage under the Act was performed. In other words, section 18 of the Wills Act, 1837 of England by its tenor does not appear to cover a subsequent marriage under the Marriage Act, Cap. 115 by a man and woman, such as the testator in the present case and his wife, the 1st respondent, who prior to their said subsequent marriage under the Act, had been validly married under customary law and living together as husband and wife even before the will in issue was made.[24]

There are two main schools of thought regarding the law that should govern issues arising under a double-decker marriage. The first school of thought argues that a second marriage under the Marriage Act converts the 'potentially polygamous' customary marriage into a monogamous marriage.[25] Accordingly, one must only resort to the Marriage Act to ascertain the incidents of the marriage. The second school of thought argues that the two marriages and their respective incidents co-exist, since under the law, 'there are different types of marriages with different legal approaches as regards their incidents and dissolution'.[26]

It is recommended that, as a *general* rule, the nature and incidents of a dual marriage should be governed by the Marriage Act. This is because the parties, by choosing to undergo a statutory form of marriage, impliedly desire that their marriage be monogamous pursuant to the statute. However, the courts can develop exceptions to this general rule where there is strong evidence to the contrary or where it would be necessary to meet the ends of justice. For example, where the parties marry under customary law and then under the Marriage Act, and where the parties have joint property that they wish to be governed by their personal customary law, it may be unjust for the Nigerian court to apply the provisions of the statute to the incidents and nature of their marriage as it relates to their property rights.

[23] *Jadesimi v Okotie-Eboh* (1996) LPELR-SC 188/1992.
[24] ibid.
[25] *Odivie v Nweke Ober and Anor* (1923) ECSNLR 733, 735.
[26] *Afonne v Afonne* (1975) ECSNLR 159, 100–109 (Oputa J) 735.

III. Same-Sex Marriage, Same-Sex Unions and Other Same-Sex Relationships

In Nigeria, by statute, same-sex marriage means 'the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship.'[27] Civil union means

> any arrangement between persons of the same sex to live together as sex partners, and includes such description as:
>
> (a) adult independent relationships;
> (b) caring partnerships;
> (c) civil partnerships;
> (d) civil solidarity pacts;
> (e) domestic partnerships;
> (f) reciprocal beneficiary relationships;
> (g) registered partnerships;
> (h) significant relationships; and
> (i) stable unions.[28]

Same-sex marriage, same-sex union, or other related forms of same-sex relationships are prohibited in Nigeria.[29] The only recognised form of valid marriage in Nigeria is the legal union between persons of the opposite sex in accordance with the Marriage Act, Islamic law, or customary law.[30]

Prior to the Same Sex Marriage (Prohibition) Act, 2013, the Supreme Court in *Meribe v Egwu* ('*Meribe*')[31] had recognised a symbolic form of 'woman to woman' marriage as valid under customary law in Nigeria.[32] It is debatable whether the decision in *Meribe* survives the Same Sex Marriage (Prohibition) Act, 2013. In *Meribe*,[33] there was a dispute between the plaintiff (son of the deceased

[27] Same Sex Marriage (Prohibition) Act 2013 s 7.

[28] ibid, s 7.

[29] ibid. The Same Sex Marriage (Prohibition) Act 2013 prohibits same-sex marriages or unions and the solemnisation of the same; gay groups, association or organisations, and shows of same-sex public affection. Section 5 of the Same-Sex Marriage Prohibition Act sanctions same-sex relationships with a maximum term of 14 years imprisonment. Section 5(2) and (3) respectively sanction administering, witnessing, aiding and abetting the solemnisation of such same-sex relationships; and registering, participating, and operating gay groups, associations or organisations with a maximum punishment of 10 years imprisonment.

[30] Same Sex Marriage (Prohibition) Act 2013 ss 3 and 7.

[31] (1976) 1 All NLR 266.

[32] This form of marriage exists in some parts of the South Eastern part of Nigeria. SC Obi, *The Customary Law Manual* (Enugu, Government Press, 1977). This tradition also exists in some other African countries. For a comparative analysis see E Cotran, *The Law of Marriage and Divorce* (London, Sweet & Maxwell, 1968) 117; RS Oboler, 'Is the Female Husband a Man? Woman/Woman marriage among the Nandi of Kenya' (1980) 19 *Ethnology* 69. Such a marriage has been recognised in Kenya for the purpose of inheritance in *The Matter of the Estate of Cherotich Kimong'ony Kibserea (Deceased)*, Succession Cause No 212 of 2010 (High Court, Kenya, 2011).

[33] (1976) 1 All NLR 266.

Chief Chekhegwu Egwu) and the defendant (grandson of Chief Chekhegwu Egwu) in relation to land belonging to one Nwanyiakoli (a wife of the Chief), who died from natural causes. The plaintiff, who was her stepson, contended that the land devolved to him under customary law. The plaintiff contended that, because Nwanyiakoli was barren, she had married the plaintiff's natural mother, Nwanyiocha, for her own husband (the Chief), and that under customary law, the children of such a marriage (the plaintiff included) are regarded as the children of the barren woman.

The defendant, being one of the deceased's grandchildren, also relied on customary law, contending that, on the death of the Chief his grandfather, his own father, Meribe (who was the deceased's eldest son), inherited Nwanyiakoli as a wife, and that on her death, Meribe inherited her properties, which later devolved on the defendant and Meribe's other children; he also submitted that the marriage of one woman to another, described as 'woman to woman' marriage, is contrary to public morality.

The trial court rejected the view that there was a 'woman to woman' marriage in the sense in which the defendant argued its case. The trial judge observed that

> the facts disclosed in evidence did not show that Nwanyiakoli married Nwanyiocha for herself – a fact naturally impossible – but that she 'married' her for her husband. The word 'married' in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwu to marry her. There was no suggestion in evidence that there was anything immoral in the transaction.[34]

On appeal, the Supreme Court endorsed the trial judge's view.[35]

Akpamgbo, in a critique of the Supreme Court's decision in *Meribe*, has argued that:

> It is the custom in Umuahia, and in fact in many Ibo communities of both Ibo and Anambra States, that if a woman has no issue, and can afford it, she can marry another woman for her husband, and any issue of such woman would be regarded as issue of the barren woman for the purpose of representation in respect of estates and inheritance. It is the barren woman who pays the dowry. She marries another woman for her husband and does not, in the language of the Supreme Court, 'procure' the woman for the husband. There is nothing intrinsically immoral, or indecent in this custom. That a matter is biologically impossible does not mean that a 'woman to woman' marriage is not the accepted custom of the people, or that the custom is contrary to law. It is in the light of the foregoing norms of the people of Umuahia that one is disturbed by the pronouncement of the Supreme Court in this case.[36]

Akpamgbo's critique of the Supreme Court in *Meribe v Egwu* focuses on the Court's use of the term 'procure'. He suggests that it was not an apt description

[34] *Meribe v Egwu* (1976) 1 All NLR 266, 275.

[35] ibid, 275.

[36] CO Akpamgbo, 'A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles' (1977) 14 *Journal of Legal Pluralism and Unofficial Law* 87, 91.

of the 'woman to woman' marriage in that case. It is submitted that the Supreme Court in *Meribe* was actually against the idea of 'woman to woman' marriage in the sense of consummating (or cohabiting) the marriage between parties of the same sex (which it regarded as contrary to public policy), rather than what occurred in *Meribe*, where a woman 'procured' another woman for her husband. It is on this basis that it is also submitted that the decision in *Meribe* survives the Same Sex Marriage (Prohibition Act) in the sense that a 'woman to woman' marriage (in that case) is a symbolic form of marriage that does not in reality require consummation or cohabitation of persons of the same sex.

From a private international law perspective, a marriage contract or civil union entered into between persons of the same sex by virtue of a certificate issued by a foreign country is void in Nigeria, and any benefit therefrom by virtue of the certificate shall not be enforced by any court of law in Nigeria.[37] The implication is that Nigerian courts will not recognise any form of same-sex relationship or benefits accruing from it (such as property rights) in Nigeria.

The refusal to recognise the validity of same-sex relationships in Nigeria is a reflection of Nigerian public policy, which does not support such forms of relationships. There are judicial statements that confirm this position as well. In *Magaji v The Nigerian Army* ('*Magaji*'),[38] Tobi JSC, in his leading judgment, described same-sex relationships (homosexuality) as a 'beastly, barbaric and bizarre offence'.[39] In *Meribe*[40] the Supreme Court observed that:

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.[41]

The criminalisation of same-sex marriage in Nigeria has become a controversial legal question, especially given the attention it has generated in other parts of the world. The idea that same-sex relations are contrary to Nigerian public policy merits a re-evaluation. Same-sex couples in foreign countries are deprived of benefits in Nigeria, which makes the Same Sex Marriage (Prohibition) Act potentially discriminatory. It has been submitted that criminalising same-sex relationships or refusing to recognise the validity of same-sex relationships is a human rights concern.[42] Countries such as South Africa, the United States of America,

[37] Same Sex Marriage (Prohibition) Act 2013 s 2(2).
[38] (2008) LPELR-1814 (SC).
[39] ibid.
[40] (1976) 1 All NLR 266.
[41] ibid, 275.
[42] RF Oppong and SF Amoateng, 'Foreign Same-Sex Marriages Before Commonwealth African Courts' (2017) 18 *Yearbook of Private International Law* 36; RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 248–49.

and several European countries have legalised same-sex relationships, which was influenced by human rights concerns. However, it seems unlikely that Nigeria will legalise same-sex relationships in the near future.

There is no express provision of the 1999 Constitution that recognises or gives protection to the validity of same-sex relationships. The only provision which comes close to recognising same-sex relationships as a constitutional right in Nigeria is Section 42(2) of the 1999 Constitution, which provides that no citizen of Nigeria shall be subject to any disability or deprivation merely as a reason of the circumstances of his birth. The Nigerian courts have, on some occasions, used Section 42(2) as a means to protect against gender discrimination, particularly against women.[43] It is doubtful, however, that the Nigerian courts would extend this interpretation to same-sex relationships on the basis of 'sexual orientation', given the approach taken by the Supreme Court in *Meribe* and *Magaji*. It is also doubtful that the Nigerian courts would accept the controversial view that persons enter into same-sex relationships as a result of the circumstances of their birth so that they should not be subject to discrimination.

As noted in the introduction, marriage and the family law issues it engages are embedded with wider societal norms and values. Nigeria's refusal to recognise same-sex relationships – whether celebrated domestically or abroad – is a reflection of its public policy and socio-cultural and religious heritage.[44] Viewed in this light, it can be argued that conceptualising issues of same-sex relationships exclusively as a human rights concern, without taking into account the socio-cultural and religious context in Nigeria, is a misplaced endeavour.

IV. Conclusion

To conclude this chapter, it is worth reiterating that matters affecting marriage, though sometimes raising significant private international law and human rights problems, cannot be divorced from the socio-cultural and religious context of a society. This requires that Nigerian courts and the legislature be alive to the local context in which they apply private international law rules to the incidents of marriage in Nigeria.

[43] *Salubi v Nwariaku* (2003) 7 NWLR 426; *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37; *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA); *Anonde v Mmeka* (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA); *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v. Ugbene* (2016) LPELR-42110 (CA) 64–67; *Okeke v. Okeke* (2017) LPELR-42582 (CA).

[44] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 182–83.

13

Matrimonial Causes

I. Introduction

It is often said that everything with a beginning has an end, or, certainly, associated problems on its path. The institution of marriage fares no better when it comes to this. Regardless of whether one is dealing with a petition for divorce, nullity of marriage, judicial separation, presumption of death, or dissolution of marriage, difficult questions of jurisdiction, choice of law, and recognition and enforcement of foreign decrees may arise. These private international law issues may also arise either from an international or inter-State perspective. In Nigeria, the Matrimonial Causes Act[1] (the 'MCA') governs a significant part of the private international law matters that may arise in this regard. This chapter addresses private international law questions in matrimonial proceedings.

II. International Actions

A. Jurisdiction in Matrimonial Causes

The question of jurisdiction in matrimonial proceedings is important as it is a threshold issue.[2] Domicile is a connecting factor that is given absolute significance for the purpose of determining jurisdiction in matrimonial causes in Nigeria.[3] There are three types of domicile in Nigeria: domicile of origin, domicile of choice, and domicile of dependence. In summary, domicile of origin is usually acquired at birth; domicile of choice is the change from domicile of origin to another place with the intention to make that place a permanent home; and domicile of dependence is a domicile acquired by operation of law (such as the domicile of a married woman being dependent on that of her husband).

[1] For an introduction see generally AB Kasumanu and JW Salacus, *Nigerian Family Law* (London, Butterworth, 1966); EI Nwogugu, *Family Law in Nigeria*, 3rd edn (Revised Edition) (Ibadan, HEBN Publishers Plc, 2014); M Onokah, *Family Law* (Ibadan, Spectrum Books, 2003); IO Agbede, '*Lex Domicilii* in Contemporary Nigeria: A Functional Analysis' (1973) 9 *African Legal Studies* 61.

[2] *Osibamowo v Osibamowo* (1991) 3 NWLR 85, 92; *Bhojwani v Bhojwani* (1995) 7 NWLR 349, 351; *Omotunde v Omotunde* (2001) 5 WRN 148, 173–74.

[3] Matrimonial Causes Act, Cap M7 LFN 2010 s 2(2).

As a matter of procedure, there are special rules for pleading domicile in matrimonial proceedings. Order 5 Rule 3(3) of the Matrimonial Causes Rules 1983 (the 'MCR') provides that the facts – *but not the evidence* by which the facts are to be proved – which the court is to rely on and utilise, shall be stated in a concise form. However, non-compliance with this rule is an irregularity that is subject to a judge's discretion, who may ask for its compliance; non-compliance does not automatically render the proceedings void.[4] In *Osibamowo v Osibamowo*,[5] counsel for the appellant had challenged the petitioner's affidavit, which disclosed his intention not to permanently live outside Nigeria, his intention of firmly establishing his business in Nigeria, and his intention to live with his family members in Nigeria. The appellant's counsel argued that these depositions only established facts of residence and not domicile. In rejecting this argument, the Court of Appeal held that '… at that stage, what was needed were the *facts* and not the *evidence*. At the trial, the *evidence* may be shown not to support *domicile*, and the court will then decline jurisdiction.'[6] The court, in the alternative, was prepared to hold that even if the appellant did not comply with Order 5 Rule 3(3), it was an irregularity that did not permanently rob the court of its jurisdiction.

In the chapter on domicile in this book, it was argued that the concept of domicile, as applied in Nigeria (under the influence of received English law), appears to be artificial and is now losing significance in other parts of the world. It is recommended that the MCA should be amended to allow habitual residence and residence for a defined period (usually one year in many jurisdictions) as alternative bases of jurisdiction in matrimonial causes in Nigeria. Many commonwealth African countries allow for multiple bases of jurisdiction in matrimonial causes.[7] In other words, once the petitioner is resident in Nigeria for a defined period, such a party should be able to invoke the jurisdiction of the Nigerian court in matrimonial proceedings.

Due to the Federal character of Nigeria, it was initially controversial as to whether there was one domicile in Nigeria as a country, or if domicile was to be determined based on the State or region in Nigeria. The first school of thought held that domicile in Nigeria was sufficient to give the court jurisdiction.[8] The second school of thought regarded domicile in Nigeria as domicile in a region or State of the Federation.[9] The rationale for this view was based on territorial jurisdiction in a Federal State – since each State had a separate jurisdiction, from the point of view of international law, it was argued, a person can only be domiciled in a State and not in Nigeria generally.[10] The enactment of the MCA has now put

[4] Matrimonial Causes Rules 1983, Order 21 r 2.

[5] (1991) 3 NWLR 85.

[6] *Osibamowo v Osibamowo* (1991) 3 NWLR (Pt. 117) 85, 92.

[7] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 190–99.

[8] *Nwokedi v Nwokedi* (1958) LLR 112; *Odiase v Odiase* (1965) 2 All NLR 91.

[9] *Okonkwo v Eze* (1960) WRNLR 80; *Machi v Machi* (1960) Lagos LR 103; *Adeyemi v Adeyemi* (1962) LLR 70; *Adeoye v Adeoye* (1962) NNLR 63.

[10] *Okonkwo v Eze* (1960) WRNLR 80; *Machi v Machi* (1960) Lagos LR 103; *Adeyemi v Adeyemi* (1962) LLR 70; *Adeoye v Adeoye* (1962) NNLR 63.

this judicial disagreement to rest in respect of matrimonial causes. Section 2(3) provides that

> a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of this Act and may institute proceedings under this Act in the High Court of any State whether or not he is domiciled in that particular State.

The effect of this provision is that when a person is domiciled in one of the States in Nigeria (eg Lagos State), that person is deemed domiciled in Nigeria. This enables that person to institute one of the various matrimonial proceedings outlined in Section 2(2); all of which can be instituted 'only by a person domiciled in Nigeria'. This deeming provision is only applicable to proceedings under the Matrimonial Causes Act; and not in any other context in which the question whether one is domiciled in Nigeria or in a State in Nigeria may be raised.[11]

Proceedings for a decree of dissolution of marriage, nullity, judicial separation, restitution of conjugal rights, and jactitation of marriage may only be instituted by a person domiciled in Nigeria.[12] As stated earlier, this makes domicile the only basis of jurisdiction for matrimonial proceedings in Nigeria. In *Jones v Jones*[13] the parties, although living in Nigeria, were domiciled in Sierra Leone. The petitioner commenced a suit for the dissolution of her marriage with the respondent. Carey J, speaking for the (then) Supreme Court of Lagos, held that:

> Domicile determines the jurisdiction of this court in divorce matters. The court has no jurisdiction to entertain a claim for dissolution of marriage on the grounds of adultery where the parties to the marriage are domiciled elsewhere than in Nigeria.[14]

In the instant case, it appeared that the petitioner and respondent were both domiciled in Sierra Leone. Accordingly, the petition for dissolution of marriage was dismissed for lack of jurisdiction.

In matters of matrimonial causes, the Nigerian cases demonstrate a strict interpretation of the concept of domicile. First, residence, no matter how long, is not equivalent to domicile. In *Bhojwani v Bhojwani* ('*Bhojwani*'),[15] the petitioner's domicile of origin was Singapore, though he was resident in Nigeria for about 14 years as a businessman. The Court of Appeal unanimously held that he had not established that he had acquired a Nigerian domicile of choice in order to invoke the jurisdiction of the Nigerian court. Similarly, in *Omotunde v Omotunde*,[16] the petitioner's long (and nearly uninterrupted) residence in the

[11] Matrimonial Causes Act, Cap M7 LFN 2010 s 2(3).

[12] ibid, s 2(2). *Shyngle v Shyngle* (1923) NLR 94; *Jones v Jones* (1938) 14 NLR 12; *Adeoye v Adeoye* (1961) All NLR 821; *Odiase v Odiase* (1965) 2 All NLR 91; *Osibamowo v Osibamowo* (1991) 3 NWLR 85; *Bhojwani v Bhojwani* (1995) 7 NWLR 349; *Bhojwani v Bhojwani* (1996) 6 NWLR 661; *Koku v Koku* (1999) 8 NWLR 672; *Omotunde v Omotunde* (2001) 9 NWLR 252; *Ugo v Ugo* (2008) 5 NWLR (Pt. 1079) 1, 25.

[13] (1938) 14 NLR 12.

[14] *Jones v Jones* (1938) 14 NLR 12.

[15] (1995) 7 NWLR 349. Upheld on appeal by the Supreme Court in *Bhojwani v Bhojwani* (1996) 6 NWLR 661.

[16] (2001) 9 NWLR 252.

United States of America, of approximately 18 years, was not enough for the respondent to establish that the petitioner had acquired a United States domicile of choice, and abandoned his domicile of origin (Nigeria), which he only visited for 10 days during his stay in the United States.

Second, flowing from the Court of Appeal's decisions in *Bhojwani v Bhojwani* and *Omotunde v Omotunde*, it is evident that it is difficult to prove the change from domicile of origin to a domicile of choice in matrimonial cases.[17] The difficulty of changing a domicile of origin to a domicile of choice may sometimes create injustice for a party (especially a non-Nigerian) who genuinely wants to invoke the Nigerian forum in matters of matrimonial causes. Such a party may have been resident in Nigeria for a very long time, but if such a party cannot establish that he or she intends to acquire a permanent home in Nigeria, he or she cannot acquire a domicile of choice in Nigeria.

Third, the fact that the wife's domicile is tied to her husband's sometimes produces harsh results.[18] In *Machi v Machi* ('*Machi*'),[19] a wife petitioned for divorce against her husband in the High Court of Lagos on the grounds of desertion. She and her husband originated from the [then] Eastern Region of Nigeria and were merely resident in Lagos. It was held at the time that the Lagos State High Court did not have jurisdiction because the petitioner's husband was not domiciled in Lagos State. De Lestang CJ reached this decision on the basis that 'it is trite law that the domicile of the wife follows that of the husband and that the wife cannot have a domicile different from that of the husband while the marriage lasts.'[20] Similarly, in *Adeyemi v Adeyemi* ('*Adeyemi*'),[21] the wife-petitioner instituted proceedings for dissolution of her marriage with the respondent on the grounds of adultery with the co-respondent referred to in the case. In her petition, she alleged adultery by them and stated that the parties to the marriage were domiciled in Lagos. The respondent-husband was born 48 years previously in Ijebu-Ode in the [then] Western Region of Nigeria, of Ijebu-Ode parents, but came to Lagos in 1941 and he was still working there at the time of the action. It was held that the Court had no jurisdiction to grant the decree sought because the petitioner had not discharged the burden placed on her to prove that the husband had abandoned his domicile of origin in favour of Lagos.

It should be noted that the cases of *Machi* and *Adeyemi* were decided at a time when there was still controversy as to whether there is a single domicile in Nigeria, or a domicile based on each region or State. In other words, if these cases were decided now, the decisions would be different to the effect that the Court would have jurisdiction based on the husband's domicile in Nigeria.[22] However, the

[17] *Cf Olowu v Olowu* (1985) 3 NWLR (Pt.13) 372.
[18] *Cf Adeyemi v Adeyemi* (1962) LLR 70; *Bhojwani v Bhojwani* (1995) 7 NWLR 349.
[19] (1960) Lagos LR 103.
[20] *Machi v Machi* (1960) Lagos LR 103, 104.
[21] *Adeyemi v Adeyemi* (1962) Lagos LR 70.
[22] See also *Koku v Koku* (1999) 8 NWLR 672, 679–80.

lesson that may be learnt from these cases, from an international perspective, is that domicile of dependence is discriminatory against women.

The MCA enacted provisions to mitigate the harshness of the rule on domicile of dependence in the case of married women. For the purposes of the MCA, 'a deserted wife who is domiciled in Nigeria either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Nigeria.'[23] In addition, 'a wife who is resident in Nigeria at the date of instituting proceedings under [the Act], and has been so resident for a period of three years immediately preceding that date, shall be deemed to be domiciled in Nigeria on that date.'[24] A related case on this point (heard under earlier legislation) is *Mason v Mason*,[25] although in that case it was the petitioner-husband that filed the lawsuit. In *Mason v Mason*,[26] the petitioner prayed for the court to dissolve the marriage between him and the respondent celebrated on 10 October 1977 at the Ikoyi Marriage Registry, Lagos, on the basis of a refusal to consummate the marriage. Although the parties were not Nigerians by nationality, the petitioner had been living in Nigeria for seven years and the respondent for four years before the proceedings were instituted. Both parties were still resident in Nigeria as at the date of the institution of proceedings. The marriage was celebrated in Nigeria. Thomas J held that, by virtue of section 7 of the Matrimonial Causes Decree, 1970, the respondent was deemed to be domiciled in Nigeria.[27]

Despite the fact that section 7 of the MCA ameliorates the harshness of the domicile of dependence for married women, it is submitted that in view of the constitutional right not to be discriminated on the grounds of gender (under Section 42(1) of the 1999 Constitution), the domicile of dependence for married women should be radically reformed. There are also writers who have criticised this rule [of domicile of dependence] as retrogressive and a violation of human rights.[28] There has been progressive statutory response in recognising a woman's independent domicile, as is the case in Kenya[29] and South Africa,[30] where an adult married woman is capable of acquiring an independent domicile of choice during marriage. In the event that the Nigerian legislature is too slow to act, the Nigerian judiciary should be bold enough to rely on Section 42(1) of the 1999 Constitution, which prohibits discrimination on the grounds of gender. Nigerian appellate courts (including the Supreme Court) have utilised the provisions of Section 42(1) of the 1999 Constitution in matters of succession as a means of

[23] Matrimonial Causes Act, Cap M7 LFN 2010 s 7(a).
[24] ibid, s 7(b).
[25] (1979) 1 FNLR 148.
[26] ibid.
[27] *Mason v Mason* (1979) 1 FNLR 148, 150.
[28] IO Agbede, '*Lex Domicilii* in Contemporary Nigeria: A Functional Analysis' (1973) 9 *African Legal Studies* 61, 93; RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 43.
[29] Law of Domicile Act 1970 s 8(3).
[30] Domicile Act 1992 s 1. In South Africa, dependent domicile of a woman has been abolished completely.

protecting women.[31] By way of analogy, this approach could also be utilised in relation to domicile of dependence for married women.

B. Stay of Proceedings

There may be situations where there are other proceedings pending before a foreign court at the time proceedings are instituted in Nigeria. From an international perspective, the MCA does not address such a scenario. It only addresses such a scenario from an inter-State perspective.[32] It is submitted here that Nigerian courts, as a matter of discretion, by taking into account the interests of the parties and the justice of the case, should grant a stay of proceedings or dismiss the case where parallel proceedings are pending before another foreign court.[33]

C. Choice of Law in Matrimonial Causes

A matrimonial cause can give rise to choice of law issues, such as the applicable law to determine the grounds for divorce, maintenance, and division of marital assets. Nigerian courts have usually applied the *lex fori* to matters of matrimonial causes. Applying the *lex fori* to all choice of law issues arising in a matrimonial cause, aside from proceedings for nullity of void marriages, may be pragmatic as it is easier, less costly, and less time-consuming to apply the *lex fori*. Indeed, the pro-*lex fori* rule may reflect the overwhelming importance Nigeria attaches to its matrimonial laws – Nigeria treats them as mandatory rules that must be applied regardless of domicile. In Nigeria, the application of the *lex fori* to issues in matrimonial causes poses little difficulty since, presently, the sole basis of jurisdiction in matrimonial causes is domicile.

D. Recognition of Foreign Decrees

The 'recognition of foreign decrees' is addressed under the MCA, Section 81.[34]

> A dissolution or annulment of a marriage effected in accordance with the law of a foreign country must be recognised as valid where, at the date of the institution of the

[31] *Salubi v Nwariaku* (2003) 7 NWLR 426; *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37; *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA); *Anonde v Mmeka* (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA); *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v. Ugbene* (2016) LPELR-42110(CA) 64–67; *Okeke v. Okeke* (2017) LPELR-42582(CA).

[32] See Matrimonial Causes Act, Cap M7 LFN 2010 s 9.

[33] *Cf Bhojwani v Bhojwani* (1996) 6 NWLR 661.

[34] Matrimonial Causes Act, Cap M7 LFN 2010 s 81(9) which provides that 'In this section, "foreign country" means a country, or part of a country, outside the Federation'.

proceedings that resulted in the dissolution or annulment, the party at whose instance they were effected (or, if they were effected at the instance of both parties, either of those parties) was,

(a) in the case of the dissolution of a marriage or the annulment of a voidable marriage, *domiciled* in that foreign country.
(b) in the case of the annulment of a void marriage, was *domiciled or resident* in that foreign country (emphasis added).[35]

A dissolution or annulment of a marriage effected in accordance with the law of a foreign country that is outside the scope of the proceeding must be recognised as valid in Nigeria if its validity would have been recognised under the law of the foreign country where, in the case of a dissolution, the parties were domiciled at the date of the dissolution, or, in the case of an annulment, where either party was domiciled at the date of the annulment.[36]

Furthermore, any dissolution or annulment of a marriage that would be recognised as valid under the rules of private international law, but to which none of the preceding provisions of this section applies, shall be recognised as valid in Nigeria, and the operation of this subsection shall not be limited by any implication from those provisions.[37] On first reading, this subsection of the law may be difficult to understand. For example, it is unclear what rules of 'private international law' are being referred to. Is it the private international law of the forum? Is it the private international law of the foreign court where the decree was made? Is it the private international law rules of any other country that has no connection with the proceedings?

It is, however, submitted that the object of this provision is to save the existing common law grounds on which foreign divorce decrees may be recognised. In other words, Section 81(5) of the MCA continues to enforce the common law rules on recognition of foreign divorce decrees. At common law, a court will recognise a foreign divorce: (i) where jurisdiction was assumed on the basis of the domicile of the spouses; (ii) where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognised by the law of the domicile of the parties;[38] (iii) where the foreign jurisdictional rule corresponds to the Nigerian jurisdictional rule in divorce proceedings; (iv) where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Nigerian court had they occurred in Nigeria; (v) where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; and (vi) where the foreign divorce is recognised in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection.[39] If this interpretation of section 81(5) of the MCA is adopted, it would be very rare for a

[35] ibid, s 81(2).
[36] ibid, s 81(4).
[37] ibid, s 81(5).
[38] This common law rule is not codified in the Matrimonial Causes Act, Cap M7 LFN 2010 s 81(4).
[39] See *Janes v Pardo* (2002) 208 Nfld & PEIR 350 at [13]–[18].

Nigerian court to deny recognition of a foreign divorce decree solely on the ground that the foreign court did not have jurisdiction.

A dissolution or annulment of a marriage must not be recognised where, 'under the rules of private international law, recognition of its validity would be refused on the grounds that a party to the marriage had been denied natural justice, or that the dissolution or annulment had been obtained by fraud.'[40]

In *Bhojwani v Bhojwani*,[41] the Supreme Court of Nigeria missed the opportunity to discuss or make reference to the provisions of Section 81 of the MCA as it relates to the enforcement of foreign decrees. In *Bhojwani*, the appellant was the petitioner in the High Court of Lagos State and was born in Singapore on 27 July 1961. The respondent was born in Lagos, Nigeria on 10 May 1963. Both parties were of Indian nationality. The appellant had been in Nigeria since 1979 for business purposes. The marriage between the parties was solemnised in England. The appellant filed a petition for decree of dissolution of the marriage at the High Court of Lagos. The respondent brought a motion seeking an order that, as the appellant was not domiciled in Nigeria, neither the High Court of Lagos, nor any other High Court in Nigeria for that matter, had jurisdiction to hear the petition for dissolution of the marriage. The trial court disagreed with the respondent, and instead ruled that it had jurisdiction. The Court of Appeal set aside the ruling of the trial court on the basis that the petitioner was not domiciled in Nigeria. The appellant appealed to the Supreme Court. Whilst the appellant was busy pursuing the issue of jurisdiction in the Nigerian courts, the respondent filed her own petition for divorce in an English court. By the time the Court of Appeal delivered its judgment that the petitioner was not domiciled in Nigeria, the English court proceeded to hear the respondent's petition for divorce. The English court finally heard the petitioner's case and granted a decree *nisi*. Despite the English court's decision, the appellant still pursued his appeal on jurisdiction at the Supreme Court. The Supreme Court dismissed the appellant's case. Belgore JSC (as he then was), in his leading judgment, observed that:

> This court has no jurisdiction to stop an English Court from hearing a petition neither can we decree a stay of proceedings extra-territorially against a foreign court. The best thing for the appellant would have been to seek his remedies in the English Courts. It is not denied that his wife has successfully obtained a decree nisi for the dissolution of their marriage before the English Court: he has not appealed against that decision. Faced with the fact of the decision of the English Court, what use is our discourse further into this preliminary issue of jurisdiction and domicile? We shall be flogging a dead horse. The appellant's remedies are not here but in the English Courts.
>
> Our Courts are to determine issues that are live. To now delve into the issue of domicile and the consequent jurisdiction of Nigerian courts will merely be academic. This court will not indulge in that. If the decree nisi granted in England is to be challenged, this

[40] Matrimonial Causes Act, Cap M7 LFN 2010 s 81(7).
[41] (1996) 6 NWLR 661.

> court is not the forum. It is true there is possibility of some moves against the registration of the English Court's judgment (Foreign Judgments Reciprocal Enforcement) Act – Cap. 152 Laws of Federation of Nigeria 1990. For the moment this court is not seised with that issue. This appeal therefore is overtaken by events because it is not possible to send the lower courts on adventure of attempting any more decree on the petition for the dissolution of the marriage already made elsewhere, albeit out of this country's territory.[42]

Onu JSC, in his concurring judgment, held that:

> It is clear that where similar parallel divorce proceedings are maintained by two spouses in two sovereign and independent countries, neither of which in law is subordinated to the other, the very fact that one of the spouses succeeds in first obtaining a *decree nisi* in one country, while the other spouse is still engaged in the preliminary 'skirmishes' of founding jurisdiction to pursue divorce proceedings in the other country vide England and Nigeria respectively, it is enough, in my view to opine that the best option for such a spouse against whom the *decree nisi* is made in order to prevent it from being made *absolute*, is to appeal against the *decree nisi* in the country where such divorce proceedings have been pursued to near finality.[43]

Though the Supreme Court made its recommendation on what the petitioner should have done, no reference was made to the provisions of Section 81 of the MCA, and the prospect of recognising the English decree in Nigeria was not considered. Thus, the *obiter* statements made by Belgore JSC and Onu JSC must be treated with caution and followed to the extent that they are in accordance with Section 81 of the MCA.[44]

E. Enforcement of Foreign Maintenance Orders

The enforcement of foreign maintenance orders is governed by the Maintenance Orders Act, 1921. The Act aims at facilitating the enforcement of maintenance orders from England and Ireland and, in the exercise of powers conferred on the President under Section 11 of the Act, has been extended to various reciprocating countries.[45] Section 3 of the Act provides that, where a maintenance order has been made against a person by a UK or Irish court, and a copy has been transmitted to the President, the President shall send a copy to the prescribed officer of a Nigerian court for registration. The prescribed officer shall then register the order, and once registered, the order has the same force and effect as if it was originally made in

[42] ibid, 666.

[43] ibid, 667.

[44] Belgore JSC's reference to the '(Foreign Judgments Reciprocal Enforcement) Act – Cap. 152 Laws of Federation of Nigeria 1990' was clearly misplaced, as that legislation is not concerned with the enforcement of foreign divorce decrees.

[45] These are: The Gambia, Ghana, Sierra Leone, New South Wales, St. Vincent, Grenada, British Guiana, Victoria, the Commonwealth of Australia, Northern Rhodesia, Western Australia, the Union of South Africa, New Zealand and the Island of Jersey. See Maintenance Orders Proclamation 1954.

the court which registered it. The Act makes provision for the transmission of maintenance orders made in Nigeria to a UK, Ireland, and other reciprocating countries.[46] The Nigerian courts are also empowered to give effect to foreign provisional orders after a hearing. At such a hearing, it shall be open to the defendant to raise any defence which they might have raised in the original proceedings, had they been a party to them, but no other defence shall be entertained.[47]

The Act is another reflection of Nigeria's colonial heritage. For example, reference is only made to maintenance orders made in a UK or Irish court for the purpose of registration in Nigeria. In respect of maintenance orders made in Nigeria, the list of countries it can be transmitted to are a few old Commonwealth countries, some of which no longer retain their current geographical nomenclature.[48]

It is recommended that the Act should be significantly amended. In this regard, it is recommended that, as a means of promoting the aims of African Union integration, African countries should be included in the list of countries that can benefit from registration of a foreign maintenance order in Nigeria.[49] Nigeria should also consider becoming a party to the Hague Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973, or the Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007.[50]

III. Inter-State Actions

A. Stay of Proceedings and *Forum Non Conveniens*

Where it appears to a court in which a matrimonial cause has been instituted under the MCA that a matrimonial cause between the parties to the marriage or purported marriage has been instituted in another court having jurisdiction under the Act, the court may exercise its discretion to stay the matrimonial cause for such time as it thinks fit.[51] Also, where it appears to a court in which a matrimonial cause has been instituted under the MCA that it is in the interests of justice that the matrimonial cause be dealt with in another court having jurisdiction to hear and determine that cause, the court may transfer the matrimonial cause to the other

[46] Maintenance Orders Act 1921 s 4.

[47] ibid, s 6.

[48] *Cf* AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 140–41.

[49] *Cf* RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 38–39; RF Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge, Cambridge University Press, 2011) 278–79.

[50] RF Oppong, 'Recognition and Enforcement of Foreign Maintenance Orders in Commonwealth African Countries' in Paul Beaumont, Burkhard Hess, Lara Walker and Stefanie Spancken, eds., *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 45, 59–62.

[51] Matrimonial Causes Act, Cap M7 LFN 2010 s 9(1).

court.[52] The court may exercise its powers under this section at any time and on any stage, either on application of any of the parties, or of its own motion.[53]

As a matter of procedure, where a matrimonial cause is transferred from another court, all documents filed of record in that court shall be transmitted, by the registrar or other proper officer of that court, to the registrar or other proper officer of the court to which the cause is transferred.[54] The court to which the cause is transferred must proceed as if the cause had been originally instituted in that court, and as if the same proceedings had been taken in that court as had been taken in the court from which the cause was transferred. However, all subsequent proceedings must be in accordance with the practice and procedure of the court to which the cause is transferred.[55]

In *Koku v Koku*,[56] the Nigerian Court of Appeal missed the opportunity to pronounce on the issue of stay of proceedings and *forum non conveniens* from an inter-State perspective under the MCA. In that case, the husband-petitioner filed a petition for divorce at the High Court of Ibadan. He served the petition on the respondent-applicant, who did not file a reply, but instead filed an application to transfer the petition to the Lagos Judicial Division of the High Court of Lagos State. The main ground for the application was that the respondent-applicant was resident in Kenya with the children of the marriage, while the husband-petitioner was resident in Lagos, and that it would be convenient for the respondent-applicant if the petition was transferred to and heard in Lagos. The petitioner, in his counter-affidavit to the application, deposed that the marriage between the parties was celebrated at Ibadan; that his address, for the purpose of the petition, was in Ibadan; that the respondent-applicant was a Federal Government Staff Member who could be transferred out of Lagos at any time without notice and that, in the circumstances, Ibadan was convenient for both parties. The respondent-applicant appealed to the Court of Appeal, which dismissed the case. Unfortunately, the Court of Appeal reached its decision without considering Section 9 of the MCA, which was relevant to determine whether a stay of proceedings or transfer of proceedings from the Ibadan High Court to the Lagos High Court should be made. It is hoped that if a case such as *Koku v Koku* presents itself in the future, reference should be made to Section 9 of the MCA.

B. Enforcement of Decrees

A decree made by a court having jurisdiction under the MCA may, in accordance with rules of court, be registered in another court having jurisdiction under

[52] ibid, s 9(2).
[53] ibid, s 9(3).
[54] ibid, s 9(4).
[55] ibid, s 9(5).
[56] (1999) 8 NWLR 672.

the MCA.[57] A decree registered in such a court may, subject to the rules of court, be enforced as if it had been made by the court in which it was registered.[58]

Where a decree made under the MCA orders the payment of money to a person, any moneys payable under the decree may be recovered as a judgment debt in a court of competent jurisdiction.[59] A decree made under the MCA may be enforced by leave of the court by which it was made (or in which it is registered), and on such terms and conditions as the court thinks fit, against the estate of a party after that party's death.[60]

Where, pursuant to the MCA, a court has made an order for payment of maintenance, the order may be registered in accordance with the rules of court in a court of summary jurisdiction of a State of the Federation, and an order so registered may, subject to the rules of court, be enforced in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction.[61] A court of summary jurisdiction means a magistrate's court or district court (as distinct from a High Court).[62]

An order under the MCA for the payment of maintenance may be enforced in accordance with the Third Schedule to the Act. The provisions of the Schedule govern the enforcement of any such order.[63]

IV. Conclusion

This chapter discussed private international law issues in matrimonial causes in Nigeria, in respect of both international and inter-State cases. The fact that domicile is the only basis of jurisdiction poses a significant challenge. It has been argued that, consistently with what prevails in other Commonwealth African countries, the MCA should be amended to allow for other bases of jurisdiction in matrimonial causes. The law on the enforcement of foreign maintenance orders is another area in need of urgent reforms.

[57] Matrimonial Causes Act, Cap M7 LFN 2010 s 89(1).
[58] ibid, s 89(2).
[59] ibid, s 90(1).
[60] ibid, s 90(2).
[61] ibid, s 91(1).
[62] ibid, s 114(1).
[63] ibid, s 92.

14

Children

I. Introduction

This chapter addresses the private international law aspects of orders concerning children and their status. Specifically, it focuses on issues such as intercountry adoption, surrogacy, international child abduction, legitimacy and illegitimacy of children. The impact of customary and Islamic law is felt here, thereby leading to internal conflict of laws. The impact of international law and international human rights is also evident here.[1]

II. Maintenance and Custody

The maintenance and custody of children in Nigeria is principally regulated by statute, customary law, and Islamic law. To some extent, international law and human rights statutes also play a role.

A. Matrimonial Causes Act

The Matrimonial Causes Act ('MCA') governs matters relating to the maintenance and custody of children arising from a statutory marriage. The MCA does not expressly address private international law problems, but the Nigerian Supreme Court has resorted to the MCA in a matter that contained a foreign element.[2] Other related cases have dealt with issues of maintenance and custody of children under the MCA from the purview of substantive law.[3]

[1] See generally B Owasanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005–2006) 39 *Family Law Quarterly* 405, 421; EI Nwogugu, *Family Law in Nigeria*, 3rd edn (Revised Edition) (Ibadan, HEBN Publishers Plc, 2014); O Adelakun-Adewale, 'Recovery of Child Support in Nigeria' in P Beaumont, B Hess, L Walker, S Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (Oxford, Hart Publishing, 2014) 241; PO Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance' (2012) 4(3) *Journal of Law and Conflict Resolution* 31; EN Uzodike, 'Custody of Children in Nigeria – Statutory, Judicial and Customary Aspects' (1990) 39 *International and Comparative Law Quarterly* 419.

[2] *Williams v Williams* (1987) LPELR-SC 117/1985.

[3] See generally *Enekebe v Enekebe* (1964) 1 All NLR 102; *Adesonoye v Adesonoye* (1971) 1 All NLR 123; *Negbenebor v Negbenebor* (1971) 1 All NLR 260; *Olu-Ibukun v Olu-Ibukun* (1974) All NLR 463, 469;

A Nigerian court may, in proceedings with respect to the maintenance of children of a marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make an order it thinks proper while having regard to the means, earning capacity, and conduct of the parties to the marriage and all other relevant circumstances.[4] The court may make an order for the maintenance of a party notwithstanding that a decree has been made against that party in the proceedings to which the proceedings regarding maintenance are related.[5] The power of the court to make an order with respect to the maintenance of children of the marriage must not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.[6]

In proceedings with respect to the custody, guardianship, welfare, advancement, or education of children of a marriage, the court must regard the interests of those children as the paramount consideration; subject thereto, the court may make such an order in respect of those matters as it thinks proper.[7] The court may adjourn any proceedings until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and any such report may thereafter be received in evidence.[8] In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or some of them as it thinks fit, in the custody of a person other than a party to the marriage.[9] Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties, or a party to the marriage, as the case may be.[10]

Maintenance and custody obligations to children under the MCA are gender neutral: an application for maintenance and custody may be made either by the father or mother of a child.

The Supreme Court has held that maintenance and custody are interlocutory matters.[11] The reason why an order for maintenance and custody is treated as

Oloyede v Oloyede (1975) 1 NMLR 18; *Oyelowo v Oyelowo* (1982) 2 NWLR 239; *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt. 290) 708; *Odogwu v Odogwu* (1992) 2 NWLR (Pt. 225) 539; *Otti v Otti* (1992) 7 NWLR (Pt. 252) 187; *Menakaya v Menakaya* (1996) 9 NWLR (Pt. 472) 256; *Anyaso v Anyaso* (1998) 9 NWLR (Pt. 564) 150; *Adekoya v Adekoya* (1999) 3 NWLR 607; *Alabi v Alabi* (2007) 9 NWLR (Pt. 1039) 297; *Ugbah v Ugbah* (2009) 3 NWLR (Pt. 1127) 108; *Bunanhot v Bunanhot* (2009) 16 NWLR (Pt. 1166) 23; *Tabansi v Tabansi* (2009) 12 NWLR (Pt. 1155) 415; *Nwosu v Nwosu* (2012) 8 NWLR (Pt. 1301) 1.

[4] Matrimonial Causes Act, Cap M7 LFN 2010 s 70(1).

[5] ibid, s 70(3).

[6] ibid, s 70(4).

[7] ibid, s 71(1).

[8] ibid, s 71(2).

[9] ibid, s 71(3).

[10] ibid, s 71(4).

[11] *Adesanoye v Adesanoye* (1971) All NLR 124.

interlocutory is for want of finality, because it is subject to revision by the court which made the order. Such orders, though appearing final, are subject to subsequent revision, suspension, or modification by the court which pronounces them.[12]

In *Williams v Williams*,[13] the Supreme Court of Nigeria applied Section 71(1)–(4) of the MCA in a matter that had foreign elements. The parties, both Nigerians, married in London. After the marriage, they lived in London and Lagos. They had three children (two boys and a girl). Their relationship later broke down irretrievably and their marriage was dissolved. The main issue at the Supreme Court was the proper order to make in respect of the custody of their daughter, known as Kalifat Abimbola Williams ('Kalifat'), who was in the custody of her mother (the 'appellant'). There was no contest in respect of the custody of the two other children, both of whom were in the custody of their father (the 'respondent'). The respondent alleged that, since the breakdown of the parties' marriage, the appellant had taken care of Kalifat in Lagos and denied the respondent access to Kalifat, while not providing sufficient care and attention to Kalifat. The respondent prayed for the High Court to grant custody of Kalifat to him, as he wanted her to receive a quality education in England, as well as to live with her brothers. The appellant did not appear before the High Court. The High Court declined to grant custody of Kalifat to the respondent. On appeal, the decision of the lower court was overturned by the Court of Appeal. On appeal to the Supreme Court, the Supreme Court granted the parties' joint custody of Kalifat.

The Supreme Court rejected the respondent's argument that the appellant did not provide sufficient care and attention for Kalifat. The Supreme Court unanimously held that the interest and the welfare of the child is the paramount consideration in granting custody of a child to a parent. Obaseki JSC, in his leading judgment, provided detailed criteria for granting custody of a child to one or both parents. He held that:

> (1) Where in any proceedings before any court the custody or upbringing of a minor is in question, the court in deciding the question shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody is superior to that of the mother or the claim of the mother is superior to that of the father. (2) In regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either without the other. (3) Nor is there necessarily any rule that mother has a paramount claim as against other relations, at any rate where the father is alive and supports the application of those relations … (4) The welfare of the infant although the first and paramount consideration is not the sole consideration and the conduct of the parties is a matter to be taken into account … (5) The adultery of a party is not necessarily a reason for depriving that party of custody

[12] ibid.
[13] (1987) LPELR-SC 117/1985.

> unless the circumstances of the adultery make it desirable. (6) All the circumstances must be considered … (7) The fact and advantages of brotherhood and sisterhood must also be considered when there is more than one child of the family and it is proposed to give custody of one child to one person and another to a different person … (8) There is settled rule that the child of tender years should remain in the custody of the mother … but obviously the care and supervision that a mother who is not out at work can give to little children is an important factor … (9) In dealing with the questions of custody or access the court will have regard to the particular circumstances of each case always bearing in mind that the benefit and interest of the child is the paramount consideration and not the punishment of a spouse for misconduct … (10) The wishes of an unimpeachable parent stand first.[14]

In relation to the plea made by the respondent to educate Kalifat abroad, Obaseki JSC, in his leading judgment (with whom other Justices of the Supreme Court agreed), held that:

> Education or opportunity for education is in the best interest of a child if it is in a proper environment. For a child of tender years, education outside the proper environment, i.e. country of origin is bound to give a distorted view of life and cannot, in the final analysis, be in the best interest of the child.
>
> It appears to be the fashion among certain classes of people to regard provision of educational opportunities for children of tender years outside this country as ultimate. Their judgment has not yet been called into question and until then, time will tell whether what has been done is in the best interest of the child.[15]

Oputa JSC, in his concurring judgment, held that:

> An Education that alienates a child from its roots, its soundness otherwise notwithstanding, is to be viewed with a suspicious eye by the Court in custody cases. A Nigerian should be trained to life in Nigeria and not to become an expatriate in his own country. Sending children too young to England may produce that result.[16]

In the final analysis, the Supreme Court held that it was in the interest of the child to grant joint custody to both parents, with care and control to the appellant and responsibility for education to the respondent.

B. Customary Law and Islamic Law

Customary law relating to Nigeria is quite varied due to the approximately 400 ethnic groups in Nigeria. Generally, under customary and Islamic law, due to the fact that polygamy is the predominant form of marriage in Nigeria, custody and

[14] *Williams v Williams* (1987) LPELR-SC 117/1985 12–13.
[15] ibid.
[16] ibid.

maintenance obligations under customary law are usually imposed on the father, who is regarded as the breadwinner of the family.[17] However, due to human rights norms, Section 42(1) of the 1999 Constitution, which prohibits discrimination on the grounds of gender, may be utilised as a basis to enable a man to also claim maintenance against a woman under customary law for maintenance of their children.

C. Constitutional Law

Every child under Nigerian law is entitled to maintenance irrespective of the circumstances of the child's birth.[18] The Nigerian Constitution thus prohibits any form of discrimination that disentitles a child to maintenance by reason of the circumstances of the child's birth.

III. Legitimacy and Legitimation

Matters relating to legitimacy in Nigeria also raise international, inter-State, and internal conflict of laws issues.[19] It has been held that, as a matter of international conflict of laws, the legitimacy or illegitimacy of a child is to be determined by the law of the country in which its parents were domiciled at the time of the child's birth.[20]

This distinction between legitimate and illegitimate children and the impact of that distinction on a child's rights, including the right to property, has been significantly diminished because of Section 42(2) of the 1999 Constitution, which provides that no person shall be subject to any deprivation or disability by reason of the circumstances of his or her birth.[21] In *Salubi v Nawariaku*,[22] the Supreme Court applied Section 39(2) of the 1979 Constitution (now Section 42(2) of the 1999 Constitution) and held that a child, born out of wedlock by the deceased person who died intestate but whose paternity the latter acknowledged in his lifetime, was entitled to share in the deceased's estate equally with issue of his lawful marriage.[23]

[17] *Febisola Okwueze v Paul Okwueze* (1989) LPELR-2539 (SC).

[18] Section 42 of the 1999 Constitution. *Cf Onwudijoh v Onwudijoh* (1957) 2 ENLR 6.

[19] PO Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance' (2012) 4(3) *Journal of Law and Conflict Resolution* 31.

[20] *Bamgbose v Daniel* (1952–1955) 14 WACA 111; *Bamgbose v Daniel* (1952–1955) 14 WACA 116.

[21] *Cf Onwudijoh v Onwudijoh* (1957) 2 ENLR 6.

[22] (2003) 7 NWLR 426.

[23] See also *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Ukeje v Ukeje* (2014) 11 NWLR (Pt. 1418) 384; *Mgbodu v Mgbodu* (2018) LPELR-43770 (CA).

The mother of a child born out of wedlock is entitled to custody of the child in the absence of any person claiming custody of the child on the basis of being the natural father. This has been justified on the basis that a child must belong to a family and should not be rendered homeless for a situation he did not create.[24]

IV. International Surrogacy Agreements

The issue of surrogacy agreements and legal parentage is increasingly becoming a significant private international law issue in the modern world. At the moment, there is no international treaty regulating matters of surrogacy agreements.[25] Nigeria has no statute dealing with International Surrogacy Agreements ('ISA'). Though there is no Nigerian statute dealing with the concept of ISAs, it does not appear that this concept is entirely alien to the indigenous customs of some African countries, including Nigeria. This form of surrogacy agreement is otherwise analogous to 'woman to woman marriage' in some African countries. It is particularly practised in the South-Eastern part of Nigeria.[26] Cotran captured this form of arrangement when he submitted that:

> A woman past the age of … child-bearing and who has no sons may enter into a form of marriage with another woman. This may be done during the lifetime of her husband but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as children of the woman who paid marriage consideration and her husband.[27]

It is instructive to note that the Supreme Court of Nigeria has legitimised this customary form of 'woman to woman' marriage.[28]

Until such time as the Nigerian legislature makes provision for this area of the law, it is recommended that Nigerian courts should give effect to surrogacy agreements to the extent that the particular surrogacy agreement is not against Nigeria's public policy. In effect, what is being said is that given the fact that Nigeria, and some other African countries, recognise an altruistic form of surrogacy arrangement, the Nigerian court, by way of analogy, should be willing to give effect to ISAs in so far as the particular ISA in question does not violate Nigeria's public policy.

[24] *Enwonwu v Spira* (1965) 2 All NLR 233; *Mojekwu v Ejikeme* (2000) 5 NWLR 402, 426; *Okoli v Okoli* (2003) 8 NWLR (Pt. 823) 565 *Anode v Mmeka* (2007) LPELR-CA/PH/72/2003, 18.

[25] See K Trimmings and P Beaumont (eds), *International Surrogacy Arrangements*: *Legal Regulation at the International Level* (Oxford, Hart Publishing, 2014).

[26] CO Akpamgbo, 'A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles' (1977) 14 *Journal of Legal Pluralism and Unofficial Law* 87.

[27] E Cotran, *The Law of Marriage and Divorce* (London, Sweet & Maxwell, 1968) 117.

[28] *Meribe v Egwu* (1976) 1 All NLR 266, 275.

V. Nigeria and Private International Law Conventions Regarding Children

Nigeria, as a member of the African Union, ratified the African Union Charter on the Rights and Welfare of the Child ('AUCRWC') on 23 July 2001. The AUCRWC provides that no child shall be deprived of maintenance by reference to the parents' marital status.[29]

Nigeria is also a signatory to the United Nations Convention on Rights of the Child ('UNCRC'), which provides that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or guardians shall have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.[30] States Parties must render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities, and services for the care of children.[31] States Parties must take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.[32]

Under the federal Child Rights Act, every child has the right to maintenance by his parents or guardians in accordance with the extent of their means, and the child has the right, in appropriate circumstances, to enforce this right in the family court.[33] The Child Rights Act has been domesticated in 24 States in Nigeria.

As noted above, Nigeria is a party to a number of international conventions that afford substantive rights to children, such as the African Convention on the Rights of the Child. It is, however, not a party to any of the conventions, especially those developed by the Hague Conference on Private International Law, that provide mechanisms and procedures for ensuring that some of those rights are realised, at least between Contracting States. These conventions include the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

It is recommended that Nigeria consider ratification of the Hague Conventions on matters relating to children as a matter of utmost importance. This should be seen as part of fulfilling its international commitment to the protection of children and enhancing the constitutional and statutory rights guaranteed for children in Nigeria. The protections afforded to children by the Hague conventions far

[29] African Union Charter on the Rights and Welfare of the Child, art 18(3).
[30] United Nations Convention on Rights of the Child, art 18(1).
[31] ibid, art 18(2).
[32] ibid, art 18(3).
[33] Child Rights Act, Cap C50 LFN 2010 s 14(2).

outweigh any disadvantages that might result from becoming a party to those conventions, including the need to change certain aspects of Nigerian law. Indeed, it would not be out of place if Nigeria became a member of the Hague Conference on Private International Law in order to take full advantage of all the benefits that the Conference offers.

VI. Conclusion

This chapter has addressed private international law matters relating to children. This area of law is a confluence between the principles of private international law and international law, of international law and human rights law. The principle of internal conflict of laws (involving the interplay between customary law, Islamic law and the Constitution of Nigeria) is sometimes at play due to the plural nature of the Nigerian society.

This chapter also discussed maintenance and custody of children. The maintenance and custody of children arising from a statutory marriage is regulated by the MCA. Although the MCA addresses mainly the substantive elements in this area of the law, the Supreme Court of Nigeria applied the provisions of the MCA in *Williams v Williams* in relation to child maintenance and custody to suit the Nigerian context. Maintenance and custody of children under customary law usually falls on the father due to the polygamous nature of such relationships, unlike the situation under the MCA, where maintenance obligations are not gender-specific. Human rights and international law, such as the provisions of the 1999 Constitution, Child Rights Act, African Union Charter on the Rights and Welfare of the Child, and the United Nations Convention on Rights of the Child, also play a role in relation to matters of maintenance and custody of children.

The Hague Conference on Private International Law (through the Hague Convention(s)) has played a very significant role in relation to children. Unfortunately, Nigeria is not a member of the Hague Conference. It has been recommended that Nigeria should consider becoming a member of the Hague Conference as well as a party to some of the conventions developed by the Hague Conference regarding children.

PART V

Property, Succession and Administration of Estates

15

Property

I. Introduction

Property raises some of the most complex private international law issues. These issues include deciding whether something constitutes property, and if so, identifying the type of property and the rights that attach thereto. This chapter addresses the nature of property, under which circumstances the courts would assume jurisdiction in respect of foreign property, and the choice of law regarding immovable property, intellectual property, and bankruptcy.

II. Nature and Legal *Situs* of Property

A simple contract debt is situated either where the debtor resides or the location in which a debtor is found, since these options allow a debt to be enforced against the party by process of law. This rule is not displaced by a stipulation for payment of the debt elsewhere.[1]

If the location in which a creditor and a debtor entered into a contract is unclear, however, the contract is deemed to have been made at the creditor's residence on the basis that a debtor carries the obligation of repaying the creditor.[2] This principle was first applied in *Blaize v Dove* ('*Blaize*').[3] In *Blaize*, a plaintiff-creditor claimed payment of the principal amount and interest due on a deed between himself and the defendants. The transaction in the deed involved a loan the plaintiff provided to the defendants. The negotiations for the loan took place in Lagos, where the plaintiff was domiciled. The defendants prepared and executed the deed in the then Gold Coast Colony, the location in which they were domiciled. The defendants sent the deed to the plaintiff in Lagos, after which the plaintiff executed

[1] *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* (1971) 2 ALR Comm 121, (1971) 2 NCLR 121.

[2] See *Blaize v Dove* (1936) 13 NLR 66; *Benworth Finance Ltd v Ibrahim* 1969 (3) ALR Comm 180; *Cold Containers (Nig) Ltd v Collis Cold Containers Ltd* (1977) NCLR 97; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 577; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172, 190–91; *Eastern Bulkcem Co Ltd v MOS Amobi* (2010) 4 NWLR (Pt. 1184) 381, 402.

[3] (1936) 13 NLR 66.

the deed. The plaintiff, on the strength of the deed granted a loan totalling £1240 to the defendants. In this action to recover the debt, the defendants objected to the jurisdiction of the court. It was held that the contract and the loan under it, being one for payment of the loan and interest in Lagos, was within the jurisdiction of the court. The court further held that in commercial transactions when cash is to be paid by one person to another, it is to be paid at the place where the person who is to receive the money resides or carries on business.[4]

III. Jurisdiction and Choice of Law

An action to recover damages for trespass of land situated abroad is not maintainable in Nigeria.[5] The rationale for this rule is based on a state's sovereignty over its own land, and the need to respect the principle of comity by declining to exercise jurisdiction over matters concerning real property that is situated in foreign land. Nigerian courts have applied this rule in inter-State matters, despite the issue being more appropriately suited to matters involving lands outside Nigeria. In *Lanleyin v Rufai*,[6] the Supreme Court held that the High Court of Lagos had no jurisdiction to entertain an action to recover damages for trespass to land in the Western Region.

This rule as applied in Nigeria – often referred to as the *Mocambique* rule – is derived from *British South Africa Company v Companhia de Mocambique*.[7] In that case, the plaintiffs' statement of claim alleged that they were rightful owners of large tracts of land in South Africa, yet agents of the defendants unlawfully took possession of the lands and displaced the plaintiff company and its servants, agents, and tenants. The plaintiffs also alleged that the defendants not only stole the plaintiffs' personal property, but also assaulted and imprisoned some of them. It was held that an English court would not entertain an action to recover damages for a trespass to land situated abroad.

Though Nigerian courts have applied the *Mocambique* rule to inter-State conflict of laws, it is submitted that the rule also applies to international conflicts. It should also be noted that the *Mocambique* rule applies only in inter-State and international matters; it does not apply to choice of venue rules within a State (in the case of a State High Court) or within the Nigerian Federation (in the case of a Federal High Court), which are meant for administrative convenience of judicial divisions, as has been wrongly held by the Court of Appeal in a decided case.[8]

[4] *Blaize v Dove* (1936) 13 NLR 66, 70.

[5] *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100; *Lanleyin v Rufai* (1959) 4 FSC 184; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, (1973) NCLR 146.

[6] (1959) 4 FSC 184.

[7] [1893] AC 602.

[8] *Cf Société Generale Bank (Nig) Ltd v Aina* (1999) 9 NWLR 414, 425 – 'This being a land suit, I shall start the consideration of this all-important issue from the import of Order 1A Rule of the High Court of Lagos State (Civil Procedure) Rules. I need not set out *in extenso* the provisions. Suffice it to say that

The *Mocambique* rule is not absolute. An exception to this rule exists where the action between the parties is founded on some personal obligation arising out of a contract or implied contract, a fiduciary relationship, fraud or other unconscionable conduct, and does not depend on the law of the *locus* of the immovable property to exist.[9]

In *British Bata Shoe Co Ltd v Melikian*,[10] the Supreme Court of Nigeria held that the High Court of Lagos State was right to have assumed its jurisdiction in an action *in personam* in respect of land situated abroad in Aba, for the purpose of ordering specific performance in respect of that land, insofar as the defendant was resident within the jurisdiction of the court. Similarly, in *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd*,[11] the Supreme Court of Nigeria held that the High Court of Lagos State was right to assume jurisdiction in an action *in personam* in respect of land situated abroad, and it was immaterial that the cause of action arose outside the territorial jurisdiction of the High Court of Lagos (Warri), insofar as the defendant was resident within the jurisdiction of the court. Also, in *Ashiru v Barclays Bank of Nigeria*,[12] the Court of Appeal held that the High Court of the Western State of Nigeria was competent to assume jurisdiction in an action *in personam* with regard to claims declaring void a deed of mortgage of immovables situated outside the court's jurisdiction, and nullifying the sale of a mortgaged property in respect of immovables situated outside the jurisdiction of the court, insofar as the parties (including the defendant) were resident within the jurisdiction of the court.

Given that the *lex situs*, as a matter of public policy, plays an important role in relation to land matters for the purpose of exercising jurisdiction in Nigeria, it is also submitted that the general rule is that the *lex situs* governs matters in relation to immovable property.[13]

the clear words say no more than that a land matter shall be determined in the Judicial Division in which the land is situate. It seems to me that this rule is generally based upon [the] practical consideration that only the courts of the *situs* can make an effective decree with regards to land. In Private International Law otherwise called Conflicts of Law, the law is immutable that in respect of immovable property, every attempt of any foreign tribunal (which includes a court not located *in situ*) to found jurisdiction over it must by the very nature of the case (land) be utterly nugatory and its order must be forever incapable of execution *in rem*. If it were otherwise, the administration of justice would be exposed to ridicule. If a Judge in State A were to hear and determine a suit the subject-matter of which is land located in State B the execution of the judgment would be near impossible if not absolutely impossible. Issue of jurisdiction is thus raised here. This has for long remained part of the common law of England. Put explicitly as the House of Lords did in the case of *British South Africa Company v Companhia de Mocambique* [1893] A.C. 602, the jurisdiction of the court is ousted where the action raises one or other of two issues, namely: first, the title to, or right to possession of land abroad and secondly the recovery of damages for trespass to such land. From what I have said so far, my answer to issue 1 is that in view of the fact that the property which is the subject-matter of this case is located at Ikeja it is the High Court located at Ikeja Judicial Division that can entertain the suit.'

[9] *British Bata Shoe Co Ltd v Melikian* (1956) 1 FSC 100; *Aluminium Industries Aktien Gesellschaft v Federal Board of Inland Revenue* (1971) 2 ALR Comm 121, (1971) 2 NCLR 121.

[10] (1956) 1 FSC 100.

[11] (1973) NCLR 146.

[12] (1975) NCLR 233.

[13] *Cf Tapa v Kuka* 18 NLR 5.

The Bankruptcy Act[14] does not directly address the cross-border and private international law issues that may arise in bankruptcy proceedings. A creditor cannot present a bankruptcy petition against a debtor unless the creditor demonstrates, *inter alia*, that the debtor is ordinarily resident in Nigeria, or, within a year before the date of the presentation of the petition, ordinarily resided, had a dwelling-house or place of business in Nigeria, has carried on business in Nigeria either in person or by means of an agent or manager, or, within the said period, has been a member of a firm or partnership of persons which has carried on business in Nigeria by means of a partner, partners, agent, or manager.[15]

Difficult private international law issues may arise in claims involving foreign intellectual property rights such as patents and copyrights.[16] Nigeria has legislation that governs intellectual property rights. However, such legislation does not directly address private international law issues.[17]

The Court of Appeal[18] has interpreted Section 41(3) of the Copyright Act[19] to permit the Minister to only order an extension of protection of a foreign copyright in Nigeria through a Federal Gazette. The Federal Gazette must be pleaded or put in evidence, since Section 113 of the Evidence Act provides that all communications of the Government of the Federation may be proved by the production of the Federal Gazette. The Court of Appeal, therefore, held that the trial court was right to decline jurisdiction to entertain a matter where a party did not bring before the trial court (in evidence) a copy of the Federal Gazette from the Minister for the purpose of protecting a foreign copyright in Nigeria.

IV. Conclusion

This chapter has briefly discussed the private international law matters that arise from property. It discussed the nature and *situs* of property, jurisdiction over property, choice of law for ownership of immovable property, bankruptcy, and intellectual property. The law appears settled that when it is unclear where a contract is made between a creditor and a debtor, the contract is deemed to have been made at the creditor's residence, on the basis that it is the debtor's duty to seek the creditor, as well as pay the creditor at its residence.

[14] Bankruptcy Amendment Decree (No 109) of 1992.

[15] ibid, s 4(1)(d). Under s 58 of the Companies and Allied Matters Act 1990, an exempted foreign company is deemed an unregistered company under the Act and the provisions of the Act that are applicable to unregistered companies are also applicable to such exempted foreign companies. Sections 532–536 provide for the winding up of unregistered companies.

[16] See generally CO Igodo, 'Enforceability of Foreign Copyright in Nigeria: A Review of the Court of Appeal's Decision in *Microsoft v Franike*' (2019) 1 *Commonwealth Law Bulletin* 227.

[17] See generally Nigerian Copyright Act, Cap 28 LFN 2004; Patents and Designs Act, Cap P2 LFN 2004; Trade Marks Act, Cap T13 LFN 2004.

[18] *Microsoft Corporation v Franike Associates Ltd* (2012) 3 NWLR 301.

[19] Copyright (Amendment) Decree No 42 of 1999.

An action to recover land or sue for trespass arising from a transaction in a foreign country is generally not maintainable in Nigeria. Matters relating to choice of law regarding immovable property, bankruptcy, and intellectual property are still developing in Nigeria; case law and legislation would be needed to develop this area of the law.

16

Succession and Administration of Estates

I. Introduction

Issues relating both to estate administration and to succession of the deceased's property are significant, regardless of whether a person dies testate or intestate. In this regard, conflict of laws matters (both from an international and inter-State perspective) relating to choice of law and jurisdiction may arise. Like marriage, this is another area of law where the pluralistic nature of the Nigerian legal system manifests itself and impacts decision making. This chapter discusses matters of succession and administration of estates from a conflict of laws perspective.

II. Choice of Law Issues

A. Testate Succession: Customary Law

(i) Customary Law as a Mandatory Norm

A person who makes a will expects that his or her property will be distributed according to the dictates of the will. A valid will provides more certainty for the beneficiaries of the deceased's estate as to how the property of the deceased should be distributed. In other words, a situation where a person dies intestate is more likely to create uncertainty for the potential beneficiaries of the estate when compared to a circumstance in which a person dies testate.

Prior to the advent of colonialism and Nigeria's contact with western civilisation, the idea of making written wills was alien to native laws and customs. Though deathbed dispositions and 'nuncupative wills' were recognised under some native laws and customs, this type of will did not fit into the scheme of the English idea of a testamentary disposition, whereby a person can freely distribute their property as he or she wishes.[1] Under native laws and customs, a person could not freely

[1] 'It has not been suggested that there are any rules of customary law which regulate the capacity to make a will, or that the making of Wills is unknown at customary law. Whereas making of written wills under statute is clearly unknown at customary law, nuncupative Wills have always been recognised.

distribute their property as they wished because his or her personal law controlled the manner in which property was devised, so that (for example) under the '*Ori-Ojori*' of '*Idi-Igi*' Yoruba Customary law, a deceased person could not devise immovable property without the consent of principal members of the family; any such devise was void.[2] Section 3 of the Wills Act 1837 (an English Statute of General Application) provided that:

> It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death.

The implication of Section 3 of the Wills Act 1837 was that the testator was free to dispose of his or her property in any manner, and any customary law to the contrary was regarded as nugatory.[3] This created an internal conflict of laws situation between customary law and the Wills Act 1837. Initially, some Nigerian judges that preferred the customary law of the testator resolved the conflict in favour of that customary law. Karibi-Whyte JSC, in a scholarly judgment, noted this when he stated that:

> It seems to me that this unregulated freedom to alter by Will established customary law was not considered to be in the best interest of the society. For instance, there were decided cases which resisted the exercise of the freedom. In *Andoh v Franklin* (unreported) but discussed in *Essays in African Law* by Allot (1960) pp 213–4, it was said that 'a native cannot divest himself of the character or status he has of being a member of a family. Such membership affects his capacity to make a Will. He cannot change that of his own volition'.
>
> In fact, in *Balonwu v Nezianya* (1957) ERLR 40, Betuel J. was emphatic that the fact that a will by a person subject to customary law is declared to be valid, 'does not validate any provisions thereunder which may be contrary to … customary law.'[4]

This decision, however, violated the literal meaning of Section 3 of the Wills Act 1837. In the subsequent case of *Adesubokan v Yinusa*,[5] the Supreme Court

Death bed dispositions and often expressed wishes of the deceased are held sacrosanct and generally observed' – *Idehen v Idehen* (1991) 6 NWLR 382, 418. See also *Okafor v Okafor* (2015) 4 NWLR 335, 369.

[2] See generally *Lewis v Bankole* 1 NLR 82, 102; *Adeseye v Taiwo* 1 FSCC 84; *Taiwo v Laani* (1964) All NLR (Pt. 4) 703; *Dawodu v Danmole* (1962) 1 All NLR 702; *Adeniji v Adeniji* (1972) 1 All NLR (Pt. 1) 298. Cases cited by Coker JSC in *Olowu v Olowu* (1985) 3 NWLR 372, 387.

[3] 'During the colonial era, the Wills Act, 1837 of England, which empowered a testator to dispose of his properties – real and personal – as he pleased, applied as an Act of general application throughout Nigeria. At that time, any native law and custom which was incompatible with the Wills Act was unenforceable and the provisions of the Act prevailed. A testator had the right to dispose of his properties, real and personal irrespective of any encumbrance of native law and custom on the property: *Adesubokan v Yinusa* (1971) 1 All NLR 225' – *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 387, 409 (Bello CJN); 'Before the enactment of the Wills Law of Western Nigeria, the Wills Act of 1837, a statute of general application, applied without any limitation upon the freedom of the testator. The testator could by testamentary disposition under the Act decide the course of inheritance and the pattern of succession at customary law'. *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 387, 416 (Karibi-Whyte JSC).

[4] *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 387, 417 (Karibi-Whyte JSC).

[5] (1971) 1 All NLR 225.

gave the provision its literal meaning to the effect that a testator could dispose of his or her property as he or she pleased, notwithstanding any customary law to the contrary. In that case, the plaintiff-respondent (a Yoruba Moslem resident in Zaria) made a claim at the High Court against the defendant-appellant for

> a declaration that the probate dated 29/6/66 granted to the defendant in the matter of Yinusa Atanda Saibu (deceased) be revoked as the said Yinusa Atanda Saibu was a Moslem, died as a Moslem, and left heirs and wives who are all Moslems.

The plaintiff, in effect, made a consequential claim that the probate should be revoked, and the estate of the testator be distributed according to Moslem law. The testator, in the will, made some bequests to one of his sons and devised his property to two others. The testator was entitled to do this under Section 3 of the Wills Act 1837. The trial judge, Bello J (as he then was), sitting at the High Court of the [then] North-Central State, granted the claims of the plaintiff-respondent and held that the testator could only devise his property to the extent that it did not violate his personal law (Maliki Moslem law), which favours equal distribution. The Supreme Court allowed the appeal and held that, insofar as the Maliki Moslem law violated Section 3 of the Wills Act 1837, it was of no effect. The Supreme Court, in effect, applied the repugnancy and incompatibility test in declaring the Maliki Moslem law invalid to the extent that it was contrary to Section 3 of the Wills Act, 1837.[6]

The idea that a testator could dispose of his or her property contrary to his or her personal law (customary or Islamic law) did not sit well with some States in Nigeria, such that the States comprising the former Western Region in Nigeria (Delta, Edo, Ondo, Osun, Oyo and Ekiti States) modified the Wills Act, 1837 to provide that (under a new 'Wills Law'):

> *Subject to any customary law* relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by will, executed in a manner hereinafter required, all real estate and all personal estate which he shall be entitled to either in law or in equity at the time of his death (emphasis added).[7]

[6] 'On this point, we call in aid the provisions of section 17(1) of the Supreme Court Ordinance (Cap 211 of the Laws of Nigeria 1948) from which sub-section 34(1) of the High Court Law derives its existence. It reads: "Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce, the observance, or shall deprive any person of the benefit of any existing native law or custom, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law for the time being in force"'. – *Adesubokan v Yinusa* (1971) 1 All NLR 225, 231.

[7] 'It is important to point out that the Wills Law under consideration was the Wills Act 1837 of the United Kingdom. It was re-enacted for Western Nigeria and came into force first on 24th July, 1958 as W.R. 1958, Cap. 133 of the Laws of Western Nigeria' – *Idehen v Idehen* (1991) 6 NWLR 382, 416 (Karibi-Whyte JSC); 'Thus the law for the first time in Nigeria takes into consideration the local situation in testamentary capacity. Hitherto, by virtue of the English Wills Act 1837, it seemed every Nigerian could make will on virtually all property he has got and could avoid providing for his eldest male or any child. See also *Adesubokan v Yinusa* (1971) 1 All NLR 225' – *Idehen v Idehen* (1991) 6 NWLR 382, 422 Belgore JSC (as he then was).

The phrase 'subject to customary law' under Section 3 of the Wills Law could be classified under the subject of conflict of laws as a mandatory norm in the sense that the testator's power to dispose of his or her properties is subject to or limited by his or her customary law.[8] In other words, the testator cannot purport to derogate from his customary law in making a will.

However, the scope of the phrase 'subject to customary law relating thereto' under Section 3 of the Wills Law was initially controversial.[9] In particular, it was unclear if the phrase meant that a violation of customary law would render the *entire will* void, or if the violation of customary law simply rendered the *bequest of the specific affected subject matter* nugatory, such that the will remained valid and the capacity of the testator to make the will was not affected. The current law in Nigeria is that the latter position is preferred.

In *Oke v Oke*,[10] it was unclear which of the above two interpretations Elias CJN favoured. Elias CJN, in delivering the leading judgment of the Supreme Court, interpreted 'subject to customary law relating thereto' in the following manner:

> The learned Counsel submitted that this Sub-section should be read as meaning that the customary law relating to succession is subject to the power of the testator to dispose of his property by Will: he further submitted that the testator's interest was by descent. We do not think that this Sub-section can be read in the way suggested by the learned Counsel because there is the preliminary exception (contained in the Sub-section) of the relevant customary law from its provision; there is also the specific reference to 'real estate' – an expression that cannot by any stretch of information be applied to the property in question. The Section clearly contemplates an absolute estate of freehold or leasehold of which the testator died possessed and of which he could dispose by Will or otherwise. It is not to be supposed that Section 3(1) of the Wills Law can confer upon a testator the testamentary capacity to devise by will which the testator would not otherwise have. The introductory phrase 'subject to customary law relating thereto' necessarily makes the power given to a testator under the sub-section dependent upon the particular customary law permitting it. In effect, the power of the testator to devise his real and personal estates by will is limited by the extent, if any, to which its exercise is permissible under the relevant customary law.[11]

In *Idehen v Idehen* ('*Idehen*'),[12] the Supreme Court was called upon by the defendant-appellant's counsel to favour the latter interpretation, to the effect that a

[8] CSA Okoli, 'Sowing the Seeds of a Future African Union Private International Law: A Review of Private International Law in Commonwealth Africa' (2014) 10 *Journal of Private International Law* 517, 522–23.

[9] See generally *Oke v Oke* (1974) 3 SC 1; *Olowu v Olowu* (1985) 3 NWLR 372, 397 (Obaseki JSC); *Idehen v Idehen* (1991) 6 NWLR 382; *Igidigbi v Igidigbi* (1996) 6 NWLR (Pt. 454) 300; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259.

[10] (1974) 1 All NLR 443.

[11] *Oke v Oke* (1974) 1 All NLR 443, 450.

[12] (1991) 6 NWLR 382. See also *Egbarevba v Oruonghae* (2001) LPELR-10341 (CA); *Odjegba v Odjegba* (2003) LPELR-7211 (CA); *Osemwingie v Osemwingie* (2012) LPELR-19790 (CA); *Eigbe v Eigbe* (2013) LPELR-20292 (CA); *Osemwenkha v Peter Osemwenkha* (2012) LPELR-9580 (CA); *Igori v Igori* (2013) LPELR-21027 (CA).

violation of customary law simply renders the subject matter of the bequest nugatory, such that the will remains valid and the capacity of the testator to make the will is not affected. The defendant-appellant's counsel also regarded Elias CJN's statement in *Oke v Oke* as wrongly decided and called for the decision to be overruled. The customary law which the Supreme Court was considering in this case was a Bini custom called the *Igiogbe*. The Supreme Court, in a number of cases, has interpreted the *Igiogbe* to mean that:

> Under the Bini native law and custom, the eldest son of a deceased person or testator is entitled to inherit without question the house or houses known as '*Igiogbe*' in which the deceased/testator lived and died. Thus, a testator cannot validly dispose of the '*Igiogbe*' by his Will except to his eldest surviving male child. Any devise of the '*Igiogbe*' to any other person is void.[13]

In *Idehen*, the testator, died on 18 September 1979. He left a will in which he made several devises and bequests to his children, the plaintiff-respondents, defendant-appellants, and other relatives. In his will, he devised to his eldest son (one Dr. Humphrey Idemudia Idehen) his two houses in Benin City. It was common ground that the deceased had lived in the two houses during his lifetime. The houses, therefore, constituted his *Igiogbe* under Bini customary law. Dr. Idehen predeceased his father, and consequently the first plaintiff-respondent became the deceased's eldest son. The plaintiff-respondents instituted an action in the High Court against the defendant-appellants, who were the executors of their father's estate, challenging the validity of the testator's will.

The trial court, *inter alia*, partially granted the claim of the first plaintiff-respondent to the effect that the *Igiogbe* now devolved on him since Dr. Idehen, to whom the bequests were made, had predeceased the testator and Dr. Idehen's sons were not entitled to the properties comprising the *Igiogbe.* On appeal to the Court of Appeal, the majority allowed the decision of the trial court by, *inter alia*, declaring the will of the testator null and void. The defendant-appellants were dissatisfied with the decision of the Court of Appeal and appealed to the Supreme Court. The Supreme Court partially allowed the appeal. The Supreme Court restored the decision of the High Court by voiding the devise of the deceased (the *Igiogbe*), but not the will itself, which the Court of Appeal had declared as null and void.

When it came to clarifying the ambit of 'subject to customary law relating thereto' under Section 3 of the Wills Law of the [then] Bendel State, and the *obiter dicta* of Elias CJN in *Oke v Oke* (above), the Supreme Court Justices were not unanimous, and provided varied perspectives on the matter. Interestingly, none of

[13] *Arase v Arase* (1981) NSCC 101, 114. See other Nigerian Supreme Court cases of *Idhen v Idehen* (1991) 6 NWLR (Pt. 198) 387; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt. 419) 259; *Agidigbi v Agidigbi* (1996) 6 NWLR (Pt. 454) 302–3; *Uwaifo v Uwaifo* (2013) 10 NWLR (Pt. 1361) 185. This type of custom also applies among the Ishan, see *Usiobaifo v Usiobaifo* (2005) 3 NWLR (Pt. 913) 665; Urhobo, see *Odjegba v Odjegba* (2004) 2 FWLR (Pt. 198) 952 CA; and Itsekiri communities, see *Oke v Oke* (1974) 1 All NLR 443.

the Supreme Court Justices regarded the *obiter dicta* of Elias CJN in *Oke v Oke* as wrongly decided. The majority of the Supreme Court interpreted it to mean that it qualified the extent to which the testator could dispose of his or her property, but did not affect the overall capacity of the testator to dispose of his or her property. Kawu JSC, in his leading judgment, stated that:

> I hold therefore that the expression 'subject to customary law relating thereto' could not have been intended to qualify the testamentary capacity so unambiguously conferred on every Bini citizen by Section 3(1) of the Wills Law. It is only subject to any customary law affecting the property to be disposed of. That being the case, I am unable to accept the submission of Chief Williams that *Oke v Oke* (supra) was decided *per incuriam*.[14]

Karibi-Whyte JSC, in a concurring judgment, interpreted 'subject to customary law relating thereto' to mean that:

> the construction is that the devise, bequest or disposition shall not be inconsistent with or contrary to customary law. In other words, the devise, bequests or disposition is to be governed and controlled by customary law. I think the last two words 'relating thereto' were not mere surplusage or inserted in vain. It refers to the customary law in respect of the devise, bequest or disposition. Herein the validity of devise, bequests or dispositions which are made contrary to customary law.[15]

Belgore JSC (as he then was), though in agreement with the judgment of Kawu JSC, did not proffer any interpretation of the phrase 'subject to customary law relating thereto'. Wali JSC, in his concurring judgment, held that:

> In the context of the facts of the appeal now before us, the only reasonable, just and logical construction that I can put on the phrase 'Subject to any customary law relating thereto' appearing at the opening of section 3(1) of the Wills Law of Bendel State is that it refers to and qualifies the property which a person cannot dispose of having regard to his customary law.[16]

Nwokedi JSC also held that:

> What construction therefore may be given to the phrase 'relating thereto' attached to 'customary law' in section 3(1) of the Cap. 172, Wills Law of Bendel State? The phrase to my mind is a qualification of limitation in the applicable customary law where the testator decides to devise by a Will his property or estates in the said section enumerated. In other words, the customary law must relate to something which the testator desires to devise or bequeath.[17]

Bello CJN dissented on this point:

> In my view the expression 'subject to any customary law relating thereto' controls and governs the whole provisions of Section 3(1) which includes testamentary capacity as

[14] *Idehen v Idehen* (1991) 6 NWLR 382, 408.
[15] ibid, 418–19.
[16] ibid, 424.
[17] ibid, 429.

> was decided in *Oke v Oke* (Supra) as well as the property to be devised. In other words, the expression governs the words 'it shall be lawful for every person to devise, bequeath or dispose of by his will' which is concerned with testamentary capacity and the expression also governs the words 'all real estate and all personal estate which he shall be entitled to either in law or in equity, at the time of his death' which covers the property to be devised. In my view, the phrase 'Subject to any customary law relating thereto' in Section 3(1) of the Wills Law is a qualification of the testator's capacity to make a will and also a qualification of the property to be devised.[18]

Olatawura JSC also expressed a similar dissent to the effect that

> the phrase 'subject to any customary law relating thereto' is a limitation on what the testator could have done without that constraint on his power. If the intention of the Will Act (*sic*) is not to testamentary capacity it ought to have said so in clear words without reference to the customary law.[19]

In *Lawal-Osula v Lawal-Osula* ('*Lawal-Osula*'),[20] the Supreme Court applied its decision in *Idehen* by interpreting 'subject to customary law relating thereto' to mean that a person can make a will, but the devise, bequest, or disposition therein shall not be inconsistent with the established customary law, but rather be governed by it. In other words, it is not a qualification of the testator's capacity to make a will but a qualification of the subject matter of the property disposed of or intended to be disposed of by will. The facts of the case were that the testator was an indigene of Benin. He lived and died as a Benin traditional chief. The deceased-testator was also a Moslem during his lifetime who married some wives under native law and custom and Islamic law. Before he died, he made a will which contained detailed provisions for his wife with whom he contracted a statutory or Christian marriage (the first defendant-appellant), his children (given birth to by the first defendant-appellant), and two other children by other women. The testator, in making his will, declared that:

> I Declare that I make the above demise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that native law and custom of Benin shall not apply to alter or modify this will.

The first plaintiff-respondent, *inter alia*, sought to challenge the validity of the deceased's will for violating the Bini customary law of *Igiogbe*. The Supreme Court, in applying Section 3(1) of the Wills Law, held that the first plaintiff-respondent was entitled to the *Igiogbe* and declared the devise (of the *Igiogbe*) to the first defendant-appellant as void. The Supreme Court, in other respects, did not tamper with the validity of the testator's will or the other dispositions made in the will.

[18] ibid, 411.
[19] ibid, 426.
[20] (1995) 9 NWLR 259. See also *Osagie v Osagie* (2009) LPELR-4533 (CA); *Isu v Abasa* (2017) LPELR-42014 (CA); *Uwadiae v Uwadiae* (2017) LPELR-43408 (CA); *Ezekiel v Ezekiel* (2019) LPELR-46425 (CA).

In *Uwaifo v Uwaifo* ('*Uwaifo*'),[21] the Supreme Court also followed its decisions in *Idehen* and *Lawal-Osula*. In that case, the plaintiff-appellant filed an action against the defendant-respondents claiming, *inter alia*, that the will of his late father (the 'testator') was null and void on the basis that the Will devised the *Igiogbe* contrary to customary law. The trial court, in its judgment, partially granted the reliefs sought by the plaintiff-appellant by voiding the devise as it related to the *Igiogbe* as being contrary to Section 3 of the Wills Law of Bendel State, but the trial court did not void the will as prayed. On appeal to the Court of Appeal and the Supreme Court, the plaintiff-appellant's further claim was dismissed.

The interpretation given to 'subject to customary law relating thereto' under Section 3 of the Wills Law by the Supreme Court in *Idehen, Lawal-Osula,* and *Uwaifo* applies to other States of Nigeria that have similar statutory provisions. For example, Section 1 of the Wills Law of Lagos State contains a similar provision to the effect that:

> It shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provision of this law, all property to which he is entitled, either in law or in equity, or at the time of his death.
>
> Provided that the provisions of this law shall not apply to any property which the testator has no power to dispose of by will or otherwise under customary law to which he was subject.[22]

The Wills Law of Rivers,[23] Cross River,[24] and Oyo States[25] similarly provide that:

> It shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with this law, all property to which he is entitled, either in law or equity, at the time of his death:
>
> Provided that the provisions of this law shall not apply
>
> (a) To any property which the testator had no power to dispose of by will or otherwise under customary law, to which he is subject, and
> (b) To the will of a person who immediately before his death was subject to Islamic law.

The extent to which customary law is a mandatory norm (in the sense that it cannot be derogated from) was not clarified by the Supreme Court in *Idehen*, *Lawal-Osula*, or *Uwaifo*. In other words, is the testator's personal law absolute?[26] Can the testator effectively change his or her personal law? In relation to the first question (as to whether the testator's personal law is absolute), the decided cases of

[21] (2013) 10 NWLR 185.
[22] Cap W2, Laws of Lagos State, 2003.
[23] Section 1, Cap 141, Laws of Rivers State, 2002. See also EI Nwogugu, *Family Law in Nigeria*, 3rd edn (HEBN Publishers Plc, 2014), 402.
[24] Section 1, Cap W2 Laws of Cross River State, 2004.
[25] Section 3(1) Cap 170 Laws of Oyo State, 1998.
[26] See also AI Fenemigho and DO Oriakhogba, 'Statutory Limitations to Testamentary Freedom in Nigeria: A Comparative Appraisal' (2013) 4 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 69–83.

the appellate courts have not yet carved out an exception to applying the personal law of the testator as a mandatory norm.[27] In *Agidigbi v Agidigbi*,[28] Kolawole JCA made a case for exceptions to applying the personal law of the testator as a mandatory norm:

> If the eldest son attempted to exterminate his father in order to succeed to the Igiogbe and the testator decided to disinherit the eldest surviving son for that purpose, would Section 3(1) of the Wills Law inure for the benefit of the eldest son in the face of such criminal act? If the eldest surviving son is an imbecile, an idiot, a mentally incompetent son who was to be looked after, what does the court do? What is the position when the eldest surviving son has been imprisoned to a long term of imprisonment for crime against his father? Would such eldest son be able to undertake and discharge the responsibilities of the status of the head of the family? Is the testator not entitled to disinherit such a son? Is the testator not entitled to disinherit such a man? I am of the view that it is contrary to public policy that a man should be allowed to claim a benefit resulting from his own crime it seems clear to me therefore that a donee who is proved to be guilty of the murder or manslaughter of the testator ought not to take any benefit under this will notwithstanding the provisions of Section 3(1) of the Wills Law.[29]

In relation to the second question (as to whether the testator can effectively change their personal law), Ogundare JSC, in *Lawal-Osula*, queried whether a testator can change his or her personal law for the purpose of devising his or her properties contrary to such personal law.[30] It is submitted that a testator can change the personal law they are ordinarily subject to (to any other law) for the purpose of succession to their properties.[31] This is an effective way of deviating from a customary law that a testator does not want to be bound by, and instead, disposing of his or her property as he or she pleases.

[27] 'The evidence of the customary law is that the eldest son of the testator is entitled, without question, to the house or houses known as Igiogbe, in which his father lived and died. It has been stated emphatically that this is the normal rule. No exceptional situations have been shown when an eldest son is denied this right by his father, even on account of demonstrable unsuitability to undertake and discharge the responsibilities of the status of the head of family'. – *Idehen v Idehen* (1991) 6 NWLR 382, 421 (Karibi-Whyte JSC). 'Under Benin Native Law and Custom, "Igiogbe" meant a principal house where a deceased Benin man lived and died; the right to inherit and possess such property vests only in the eldest son. The tradition takes precedence over and above the wishes of a deceased father no matter how strong he feels against his son as the prospective heir. It is a right vested in the eldest son and which cannot be divested by means of inheritance' – *Uwaifo v Uwaifo* (2013) 10 NWLR 185, 206 (Ogunbiyi JSC). See also *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt. 371) 375 where the Court of Appeal decided that neither testamentary disposition nor family arrangement can deprive the eldest surviving son of 'Igiogbe'.

[28] (1991) 6 NWLR (Pt. 198) 382.

[29] *Agidigbi v Agidigbi* (1991) 6 NWLR (Pt. 198) 382, 421.

[30] 'In paragraph 7 of his Will (Exhibit A), the deceased declared as follows: "7. I Declare that I make the above demise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that native law and custom if Benin shall not apply to alter or modify this will". I do not express any opinion as to whether this declaration is sufficient to lead one to hold that the deceased had changed his personal law from the Benin Customary Law to the common law or any other type of law – See *Olowu v Olowu* (1985) 3 NWLR (Pt. 13) 372, as we have no advantage of submissions of counsel on the issue'. *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR 259, 281.

[31] *Olowu v Olowu* (1985) 3 NWLR (Pt. 13) 372.

In states of the Federation where the testator is not subject to customary law in devising their properties, the testator can dispose of their property as they please, any customary law to the contrary notwithstanding (*Adesubokan v Yinusa* (above)), so that the cases of *Idehen*, *Lawal-Osula*, and *Uwaifo* would be inapplicable. Thus, in *Okafor v Okafor*,[32] the plaintiff-appellant and the defendant-respondents (second to ninth respondents) were the children of the deceased-testator, a native of Oranto Village, Anambra State. The first defendant-respondent was the wife of the testator, and the plaintiff-appellant was the first son of the testator and son of the first defendant-respondent. The testator devised his properties to the exclusion of the first plaintiff-appellant. The plaintiff-appellant challenged the validity of the will, *inter alia*, before the High Court of Anambra State to the effect that he, being the first son of the testator, was entitled, under Ukpo Customary Law, to the custody and possession of the unshared and/or undistributed immovable property of the testator, and sought a declaration that the demise to the second through ninth respondents was null and void. The High Court dismissed the case. On appeal, the Court of Appeal unanimously dismissed the matter. Bolaji-Yusuff JCA delivered the leading judgment, and stated the following:

> If the legislature had intended that where there is a conflict, the customary law of the place where the land situates will prevail, it would have expressly stated so as was done in section 3(1) of the Wills Laws, Cap. 172, Laws of Bendel State 1976, which was considered by the Supreme Court in *Idehen v Idehen* (1991) 6 NWLR (Pt. 198) 382, *Oke v Oke* (1974) 1 All NLR 443 at 450. The position of the Supreme Court was dictated by the opening words of section 3(1) of the said Wills Law which are: 'Subject to any customary law relating thereto.' This phrase is not in section 137(1) of the Administration and Succession (Estate of Deceased Persons) Law of Anambra State which confers on the testator the capacity or the right to bequeath or otherwise dispose of any disposable property which he shall be entitled to at his death by Will. By section 136 of the law disposable property include real estate and real estate include building and lands except an undivided share of interest in family or communal land.
>
> Unlike section 3(1) of the Wills Law of Bendel State, section 137(1) of Administration and Succession (Estate of deceased persons) Law contain[s] no qualification or limitation to the testator's capacity to make a Will or the property to be devised.[33]

(ii) Formal Validity of Wills

With the exception of Anambra State, most States in Nigeria at the moment do not have a comprehensive statutory provision dealing with the formal and essential validity of wills.[34] Nigeria is also not a party to the Hague Convention on the

[32] (2015) 4 NWLR 335.
[33] *Okafor v Okafor* (2015) 4 NWLR 335, 369–70.
[34] But see s 164(1) and (2) of the Administration and Succession (Estate of Deceased Persons) Law, Cap 4 Laws of Anambra State of Nigeria 1991 which provides thus: '(1) Subject to the other provisions of this section, the formalities and manner of making, and the intrinsic validity and effect of a Will, so far as the Will relates to an estate or interest in land, shall be governed by the law in the place where the land is situated.

Conflict of Laws Relating to the Form of Testamentary Disposition (the 'Hague Convention'). It is recommended that Nigeria becomes a party to the Hague Convention or, as other African states have done,[35] enact domestic legislation inspired by relevant provisions of the Convention to overcome this gap in the existing law. Article 1 of the Hague Convention, which deals with the formal validity of wills, is particularly important in this regard. It provides that:

> A testamentary disposition shall be valid as regards form if its form complies with the internal law:
>
> *a)* of the place where the testator made it, or
> *b)* of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
> *c)* of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
> *d)* of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
> *e)* so far as immovables are concerned, of the place where they are situated.
>
> For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.
>
> The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

These rules relating to the formal validity of a will also apply to the determination of whether a testamentary revocation was valid in its form.[36] The Hague Convention characterises matters of form to include references to the age, nationality, other personal conditions of the testator, and qualifications that must be possessed by witnesses required for the validity of a testamentary disposition.[37]

B. Intestate Succession

(i) Significance of Connecting Factors

The determination of what law applies to the property of a deceased person who dies intestate in Nigerian conflict of laws is fact-dependent. In conflict of laws,

(2) Subject to other provisions of this section, the formalities and manner of making and the intrinsic validity and effect of a Will, so far as the Will relates to an interest in movables, shall be governed by the law of the place where the testator was domiciled at the time of his death.'

See also *Okafor v Okafor* (2015) 4 NWLR 335, 369.

[35] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 278–86.

[36] The Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Disposition 1961, Art 2.

[37] The Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Disposition 1961, Art 5.

connecting factors play a significant role for the purpose of determining the law applicable to the succession to the property of a deceased person. In *Olowu v Olowu*,[38] Oputa JSC, in a concurring judgment, observed in this regard that:

> In cases dealing with conflict of laws, there is always a 'competition' between the *lex patriae* of the Roman jurists or what is now known as personal law, the *lex situs* or *lex loci* of the property involved, the *lex domicilli* of the deceased, the *lex fori* of the forum *competens* …
>
> There are different 'tribes and tongues' in Nigeria – different customary laws dealing with devolution of property on intestacy. Where there is a clash between two or three of these different customary laws and the court has to choose which one should apply, we have an issue of conflict of laws …[39]

In determining the applicable law, Nigerian courts usually give special significance to the *lex situs* and the personal law of the deceased person when compared to other connecting factors. However, it has been held by the Supreme Court that the succession to the property of a person who dies intestate is not determined by the place of burial of the deceased, or by a life policy made *inter vivos* by the deceased.[40] In effect, the Supreme Court regarded these connecting factors as irrelevant.

In Nigeria, the general rule is that succession to the immovable property of a deceased is governed by the *lex situs*.[41] In this regard, Agbede submitted that:

> One of the most deeply-rooted principles of the received English conflict of law rules is that all questions relating to immovables are governed by the *lex situs*, with few exceptions. The *lex situs*, for example, determines the various forms of capacity for the disposition or acquisition of immovable, the formal requirements for conveyance of immovable, and matters of material validity of a disposition of interest in land either *inter vivos* or *causa mortis*.[42]

The application of the *lex situs* as a choice of law rule to govern succession to immovable property may be justified on the basis that the *lex situs* is a strong connecting factor to govern matters of succession to the estate of a deceased person. Given that matters of succession relating to immovable property might require a court to pronounce on issues relating to foreign land, it requires that a Nigerian court gives

[38] (1985) 3 NWLR 372.

[39] *Olowu v Olowu* (1985) 3 NWLR 372, 402.

[40] 'I realise that two of the appellants' claims of succession to the estate were based on the fact that the deceased was buried in the personal residence of the 1st appellant and the life policy of the deceased where he made his first and second children and the 1st appellant as beneficiaries. I know of no law which says that succession to property is determined by the place of burial of the deceased intestate or by a life policy *inter vivos*'. – *Obusez v Obusez* (2007) 10 NWLR 430, 451 (Tobi JSC); 'Although the 1st defendant/appellant is a beneficiary under the Life Policy Insurance of his deceased brother forming part of the estate of the deceased, that alone does not give him the right of priority in grant of Letters of Administration'. *Obusez v Obusez* (2007) 10 NWLR 430, 455–56 (Mohammed JSC).

[41] *Mojekwu v Iwuchukwu* (2004) 11 NWLR 196; *Osagie v Osagie* (2009) LPELR-4533 (CA) 28. See also *Olowu v Olowu* (1985) 3 NWLR 372, 387 (Coker JSC).

[42] IO Agbede, 'Devolution of Immovables under the Nigerian Conflict Rules: The Dilemma of Legal Pluralism' (1977) 9 *Journal of Legal Pluralism and Unofficial Law* 45, 46.

special significance to the *lex situs* as the applicable law. Indeed, by way of analogy, it might also explain why, as a general rule, Nigerian courts (like some other Commonwealth countries)[43] do not assume jurisdiction over immovable property in a foreign country.[44] Nigerian courts, however, have not applied the *lex situs* rule consistently. Some Nigerian courts have found ways to apply the personal law of the deceased to determine succession to his or her immovable property in order to provide justice in a particular case. The application of the personal law of a deceased person may be justified on the basis that it meets the expectations of the deceased in relation to the distribution of his or her estate. Another explanation may be that courts have indirectly interpreted the *lex situs* to mean a reference to both the substantive law of the forum and its conflict of laws rules, and it is the conflict of laws rules that allow for the application of the personal law.

Interestingly, in the early cases, Nigerian courts applied the personal law of the deceased as the governing law for succession to the immovable property of a [deceased] person. In *Tapa v Kuka*,[45] a Nupe Moslem of Bida (a tribe in Niger State) died, leaving property in Lagos. It was held that the personal law of the deceased (Moslem Tapa customary law) applied to determine questions relating to succession to his immovable property. Similarly, in *Re the Estate of Aminatu, Attorney-General v Tunkwase*,[46] the deceased was a Moslem of Ijebu origin who died intestate in Lagos. The High Court held that the Ijebu native law and custom was applicable to determine the distribution of the estate of the deceased person. In *Zaidan v Mohssen*,[47] the Supreme Court applied *Tapa v Kuka* to hold that the personal law of the deceased was the applicable law in relation to the distribution of his immovable properties. However, the court also affirmed the position that the *lex situs* governed the immovable property of a deceased person. The Supreme Court, in effect, applied the personal law of the deceased person through a controversial route so that the decision might be regarded as an isolated case. Indeed, the Supreme Court regarded the case as one of 'first impression'.[48] Some authors have also critiqued the approach of the Supreme Court and called for the decision to be overruled.[49]

[43] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 255–77.

[44] See generally *British Bata Shoe Co. Ltd v Melikian* (1956) 1 FSC 100; *Lanleyin v Rufai* (1959) 4 FSC 184; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, (1973) NCLR 146.

[45] 18 NLR 5. Noted by Bello J (as he then was) in *Yinusa v Adesubokan* (1968) NNLR 97, 99. See also *Olowu v Olowu* (1985) 3 NWLR 372, 389 (Bello JSC as he then was).

[46] 18 NLR 88. Noted by Bello J (as he then was) in *Yinusa v Adesubokan* (1968) NNLR 97, 99. See also *Olowu v Olowu* (1985) 3 NWLR 372, 389 (Bello JSC as he then was).

[47] (1973) 1 All NLR (Pt. II) 86. See also G Woodman, 'Moslem Law in Nigeria: The Decision in *Kharie Zaidan v. Fatima Khalil Mohssen*' (1976) 20(1) *Journal of African Law* 63–69.

[48] *Zaidan v Mohssen* (1973) 1 All NLR (Pt. II) 86, 98.

[49] IO Agbede, 'Devolution of Immovables under the Nigerian Conflict Rules: The Dilemma of Legal Pluralism' (1977) 9 *Journal of Legal Pluralism and Unofficial Law* 45.

In *Zaidan v Mohssen*, the parties in the case were of Lebanese nationality. The deceased husband died intestate and had been domiciled in Lebanon. He was survived by his wife (the defendant-appellant), who was also domiciled in Lebanon, and by the plaintiff-respondent, who was the mother of the deceased (who had given her surviving son a power of attorney to sue on her behalf). The deceased and the wife were married according to Moslem law and had long been resident in Nigeria. The deceased, at the time of his death, left leasehold properties in Warri in the [then] Mid-Western State of Nigeria (now Delta State).

The main issue for determination was the law that was to be applied to the intestate succession to the immovable property of a deceased person in Warri. Counsel for the plaintiff-respondent argued that the leasehold property should be distributed in accordance with the Moslem law of Lebanon; counsel for the defendant-appellant contended that the properties should be distributed in accordance with the Administration of Estates Law of Western Nigeria. The trial judge held in favour of the plaintiff-respondent and applied the Moslem law of Lebanon. On appeal to the Supreme Court of Nigeria, the defendant-appellant's case was dismissed. The Supreme Court reached its decision by considering Section 20 of the Customary Courts Law of Western Nigeria, which determines potential conflicts between two systems of customary law. Section 20 provides that:

> (1) In land matters the appropriate customary law shall be the customary law of the place where the land is situated.
> (2) In causes and matters arising from inheritance the appropriate customary law shall, subject to sub-sections (1) and (4) of this section, be the customary law applying to the deceased.
> (3) Subject to the provisions of sub-sections (1) and (2) of this section—
>
> (a) In civil causes or matters where
>
> (i) both parties are not natives of the area of jurisdiction of the court; or
> (ii) the transaction, the subject of the cause or matter was not entered into in the area of the jurisdiction of the court; or
> (iii) one of the parties is not a native of the area of jurisdiction of the court
>
> and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties;
>
> (b) In all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court.

In interpreting the above quoted provision, the Supreme Court held that:

> If one looks at section 20(3)(a)(i), one finds that, where both parties are not 'native' to the area of the court's jurisdiction, then, at least in the High Court, the customary law binding between the parties must be applied. Where, therefore, a person dies leaving immovable property in Warri and is subject to a system of customary law which does not obtain in Warri, the law to govern the succession to his estate is not Administration of Estates Law because section 1(3) of the Administration of Estates Law is quite clearly

> against it, but the Moslem law which is binding between the parties. We agree with the learned counsel that this is the *rationale* of *Tapa v. Kuka* 18 N.L.R. 5. Just as the court in Lagos is entitled to apply as between the parties before it a system of Tapa customary law in respect of immovable property in Bida, so can a Mid-Western Nigeria High Court apply Lebanese law to succession to immovable property in Warri in the case of Lebanese parties.[50]

Interestingly, the Supreme Court was of the view that the '*lex situs* governs the immovable property of a deceased intestate',[51] but applied *renvoi* to the effect that

> the *lex situs* means the law of Nigeria which embraces customary law including the conflict rules between two systems of customary law as laid down in section 20 of the Customary Courts Law which is a summary of the various previously existing decisions on internal conflict of laws.[52]

This was the basis upon which the Supreme Court justified the application of the personal law of the deceased person (Lebanese Moslem law).

Another controversial aspect of the Supreme Court's decision was the classification of the scope of the concept of personal law in Nigeria. First, the Supreme Court treated Moslem law as a form of Nigerian customary law. In this regard, the Supreme Court held that the 'uncontradicted evidence throughout the whole case in the trial court is that the Moslem law that is applicable is the same everywhere whether in Lebanon or in Nigeria or elsewhere'.[53] Secondly, the Supreme Court extended the classification of customary law to include customary law outside Nigeria (or foreign customary law), such as, in this case, Lebanese Moslem law. In this regard, the Supreme Court defined customary law to mean 'any system of law not being the common law and not being a law enacted by any competent legislature, but which is enforceable and binding within Nigeria as between the parties[54] subject to its sway'.[55]

In later cases, the Supreme Court of Nigeria has favoured the application of the *lex situs* to govern succession to the immovable property of a deceased person.[56] In *Mojekwu v Iwuchukwu*,[57] the deceased person left immovable property situated at Onitsha in Anambra State. The plaintiff-appellant (who was the nephew of the deceased) claimed a declaration that 'he was entitled to the statutory right

[50] *Zaidan v Mohssen* (1973) 1 All NLR (Pt. II) 86, 98.
[51] ibid, 100.
[52] ibid, 100.
[53] ibid, 100.
[54] 'We think that while "parties" in section 17 of the Customary Courts Law may apply only to Nigerians within the context of the Customary Courts Law, it does not follow that "parties" can be so restricted within the context of the High Court Law since all persons in Nigeria, whether Nigerians or foreigners, are subject to the jurisdiction of every High Court in Nigeria'. *Zaidan v Mohssen* (1973) 1 All NLR (Pt. II) 86, 100.
[55] *Zaidan v Mohssen* (1973) 1 All NLR (Pt. II) 86, 101.
[56] *Mojekwu v Iwuchukwu* (2004) 11 NWLR 196.
[57] (2004) 11 NWLR 196.

of occupancy of the property situated at No. 61 Venn Road, South, Onitsha.' One of the ancillary issues before the Court of Appeal was whether the personal law of the deceased (*oli-ekpe* custom) or the *lex situs* (Mgbelekeke 'kola' tenancy) applied to govern the immovable property of the deceased person. Tobi JCA (as he then was), speaking for the Court of Appeal in his leading judgment (which was unanimously endorsed by other Justices of the Court of Appeal), appreciated the internal conflict in the case and applied the customary law of the *lex situs*. The judgment is worth quoting:

> There are instances where the *lex situs* and the personal law are the same. Such instances arise where the deceased was a native of the area or locality where the land is situate, to the extent that both share a common and uniform customary law. The present appeal is not one of such instances as the deceased was a native of Nnewi while the property in dispute is situate in Onitsha.
>
> And so, we have an internal conflict situation in this appeal. I resolve the conflict by accepting the decision of the learned trial judge that the applicable law is the *lex situs*, which is the Mgbelekeke family kola customary tenancy.[58]

On appeal to the Supreme Court, the Supreme Court also dismissed the appeal by applying the *lex situs* (Mgbelekeke family 'kola' customary tenancy).[59]

(ii) Change of Personal Law

As stated earlier, personal law is a significant connecting factor that could be taken into account in determining the law applicable to both the movable and immovable property of a deceased person.

In *Mojekwu v Mojekwu*,[60] Tobi JCA (as he then was), speaking for the Court of Appeal in his leading judgment (which was unanimously endorsed by other Justices of the Court of Appeal), held that:

> personal law, in the context of succession cases, would appear to mean the law the deceased was normally subject to when he was alive. It is peculiar to him and his family unit and could be distinct from the law prevailing or predominant in the area or locality of the deceased. In most cases, it dovetails into and is assimilated by the law prevailing or predominant in the area or locality of the deceased.[61]

The two main questions for consideration are: for the purpose of succession to the deceased's property, could the deceased person have changed his or her personal law while he or she was alive? How could the deceased person have changed his or her personal law for the purpose of succession to his or her property?

[58] *Mojekwu v Mojekwu* (1997) 7 NWLR 283, 300.
[59] *Mojekwu v Iwuchukwu* (2004) 11 NWLR 196. Under a Kola tenancy the right to use and occupy an unwanted portion of land is granted in exchange for a token 'kolanut' payment.
[60] (1997) 7 NWLR 283.
[61] ibid, 300.

(a) Changing Personal Law to English Common Law

For the purpose of succession to the estate of a deceased person, a person can change his or her personal law while he or she is alive. One of the most significant ways a change of personal law can be effected is where a person who is ordinarily subject to customary law contracts a Christian or statutory marriage. Where a person who is ordinarily subject to customary law contracts a Christian marriage or statutory marriage, that person's property is distributed in accordance with English common law. In reality, this rule has been codified in many States in Nigeria, subject to minor amendments (this point will be returned to shortly).

The *locus classicus* on the subject of change of personal law in Nigeria, for the purpose of the distribution of the estate of an intestate, is *Cole v Cole* ('*Cole*').[62] In *Cole*, Mr Cole (the 'deceased') lived most of his life in Lagos, and he died domiciled there. However, during his lifetime, he contracted a Christian marriage with one Mary Cole in Sierra Leone in 1874. They had a child who was of unsound mind. The deceased died in 1897. The deceased's brother commenced an action seeking a declaration both that he was the customary heir of his late brother, in accordance with customary law, and that he was the son's trustee. The deceased's widow challenged the deceased's brother by contending that succession to the deceased's estate should be governed by English law relating to the distribution of personal estates of intestates. Under English common law, the widow and her son were entitled to inherit the estate to the exclusion of the brother. The Full Court (now the Supreme Court) held that English law should govern succession to the deceased's estate on the basis that by contracting a Christian marriage, Cole had moved the distribution of his estate from customary law to English law. Brandford Griffith J, speaking for the Court, rationalised his decision in the following manner:

> Let us compare the position of the parties in native and Christian marriages. By native law a man can marry as many wives as he can afford to pay for. The wife does not take the husband's name, nor do the husband and wife become one person, but the wife remains a member of her family and often continues to live in her own house apart from the husband. The wife's property remains her own. By strict native law when a man dies his eldest brother of his mother's side takes his widow as his wife – that is the native method of providing for the widow. It is a consequence of the loose tie of the native marriage that by strict native law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family.
>
> The position of a man and a woman who marry according to Christian rites is entirely different. Christian marriage imposes on the husband duties and obligations not recognised by native law. The wife throws in her lot with the husband. She enters his family, her property becomes his. In fact, a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.

[62] (1898) NLR 15.

> In such circumstances can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of native law and custom? I think not.[63]

It is submitted that the decision in *Cole* might have been influenced by a prior enactment of an English 'Statute of General Application', relating to the law governing the distribution of the properties of a person who dies intestate (ordinarily subject to customary law), but contracts a Christian marriage or statutory marriage – Section 41 of the Marriage Ordinance 1884. Section 41 of the Marriage Ordinance 1884 dealt at that time with this internal conflict of laws situation by providing that:

> Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of any other Ordinance relating to marriage, or has contracted a marriage prior to the passing of this Ordinance, which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband or any issue of such marriage,
>
> And also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this ordinance,
>
> The personal property of such Intestate and also any real property of which the said intestate might have disposed by Will shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of Intestates, any native law or custom to the contrary notwithstanding.

In this regard, it is open to question whether the Court in *Cole* should have made express reference to the Marriage Ordinance of 1884. This point is significant because some Nigerian judges and authors who have analysed, criticised or applied the decision in *Cole* appear to overlook the significance of Section 41 of the Marriage Ordinance 1884 in force at the relevant time, which was then applicable to Nigeria as a Statute of General Application; the decision in *Cole* may simply have been restating the provisions thereof without making it obvious.

Interestingly, other Nigerian Judges have claimed that the decision in *Cole* influenced the drafting of Section 36 of the Marriage Ordinance[64] and the current Administration of Estates Laws of some States in Nigeria, which is similarly worded to the decision in *Cole*; the wording of the statutes in question had already been reflected in Section 41 of the Marriage Ordinance 1884, subject to slight modifications (this is a point that will be returned to later). The decision in *Cole* will be further analysed here from three perspectives: first, cases that have followed *Cole*, second, cases where Nigerian judges have distinguished *Cole*, and third, the current significance of *Cole* on Nigerian jurisprudence.

[63] *Cole v Cole* (1898) NLR 15, 22. See also *Ayorinde v Kuforiji* (2007) 4 NWLR (Pt.1024) 341, 370; *Ugbene v Ugbene* (2016) LPELR-42110 (CA); *Nebuwa v Nnenna* (2018) LPELR-45097 (CA).

[64] 'The decision in *Cole v Cole* was given statutory recognition in Section 36 of Marriage Act, Cap 115 Laws of the Federation of Nigeria and Lagos 1958 …' – *Olowu v Olowu* (1985) 3 NWLR 372, 390 (Bello JSC as he then was).

In relation to the first scenario (cases where Nigerian courts have followed *Cole v Cole*), the first reported case that appears to have followed *Cole* is *Adegbola v Folaranmi*.[65] In that case, Mr Johnson, *alias* Ajayi of Awe, married Oniketan according to native law and custom in a place situated in what is now known as Oyo State in Nigeria (then Protectorate of Oyo under colonial rule). They both had one daughter called Adegbola (the 'plaintiff'). When the plaintiff was about 10 years old, Mr Johnson was seized and shipped as a slave to the West Indies where he lived for about 40 years. Oniketan and Adegbola remained at Awe. In the West Indies, Mr Johnson converted to the Christian faith and became a member of the Roman Catholic Church. He also contracted a Christian marriage with another woman known as Mary Johnson. Mr Johnson returned with his second wife to Nigeria, purchased property and built a house on it. In 1900, Mr Johnson died intestate. Mary Johnson continued to occupy the house and property until her own death in 1918. Mary Johnson made a will appointing the first defendant her executor and leaving to him Mr Johnson's house. In this action, the plaintiff, Adegbola, claimed that as her father had died intestate, she, as his only child had inherited her father's land and house in Lagos and was entitled to the possession of the property in question. The defendant's answer to her claim was that Mr Johnson and Mary Johnson were married in Trinidad according to Christian rites; that the law which governed the inheritance of Mr Johnson's property in Lagos was the law of England and not native law and custom; and that, as, under the common law of England the plaintiff was not a lawful child of Mr Johnson, she did not inherit his real property in Lagos and was not entitled to the possession of the property.

The Court held that, notwithstanding the lack of a certificate of the Christian marriage between the deceased and his second wife, the Court would recognise the validity of the Christian marriage on the basis that the deceased, at the time he contracted his second marriage with his second wife, considered himself absolved of all obligations to his native law, custom, and 'pagan' relations with his 'pagan' wife.[66] In relation to the law applicable to the facts of the case, Combe CJ, speaking for the [then] Full Court, held the following:

> Having found that Harry Johnson had contracted a Christian marriage with Mary Johnson the next question which the learned Judge had to decide was what law applied to the inheritance of Harry Johnson's real property in Lagos. Now when native law and custom relating to inheritance is applicable to the circumstances of the case the Courts of this Colony will always observe such law and custom. But it has been held by this Court in the case of *Cole v Cole* … that the native law and custom relating to inheritance is not applicable when the deceased has contracted a Christian marriage and leaves a widow of such marriage, and that in such case the common law of England should be applied. The learned Judge in the Court below held that he was bound by that decision and that the English common law and not native law and custom must govern the question as to who inherited the premises, the subject of this action, on the death of

[65] (1921) 3 NLR 89.
[66] *Adegbola v Johnson* (1921) 3 NLR 81, 83–84.

> Harry Johnson. I agree that the decision of the Full Court in that case of *Cole v Cole* covers the facts in this case and that the learned Judge in the Court below was bound by that decision. This court is also bound by the decision.[67]

In *Gooding v Martins*,[68] the deceased first contracted a Christian marriage which resulted in the birth of the plaintiff. The first wife of the deceased died, and the deceased subsequently married a second wife under native law and custom. The defendants were the children of the customary law marriage. The defendants claimed a share in the deceased's estate. The court applied *Cole* to the effect that the defendants had no claim to their father's estate. Similarly, in *Coker v Coker*,[69] Brookes J restated the rule in *Cole* to the effect that 'the intestate estate of a native who contracts a Christian or civil marriage is removed from the operation of native law of succession and brought under the common law of England'.[70] In *Olowu v Olowu*,[71] Bello JSC (as he then was), stated *obiter dicta* that:

> It may be observed that change of personal law choice is not new to our legal system. It has been with us since 1898. The classical case of *Cole v Cole* … which has been followed by a plethora of cases since then, converts into an English man or woman for the purpose of distribution of his or her estate upon his or her death intestate any Nigerian irrespective of his or her customary law who contracts a marriage by Christian rites or according to English law.[72]

Bello JSC (as he then was) further justified the decision in *Cole* on the basis that:

> It is pertinent to note that the mere choice by the spouses to marry by Christian rites or according to English law or in accordance with the provisions of the [Marriage] Act coupled with the celebration of the marriage, without having any connection or association with England whatever, renders the spouses to become English spouses for the purpose of the distribution of their estate if either dies intestate. It is in order to ensure that spouses voluntarily and with the full knowledge of the consequences contract such a marriage that section 36(2) of the Act enjoins the Registrar to explain to both parties the effect of the provisions of the Section.[73]

In relation to the second line of cases (where Nigerian judges have distinguished or questioned the authority of *Cole*), the first case to distinguish *Cole* was *Onikepe v Goncallo*,[74] which was decided two years after *Cole*. In that case, the deceased, a Yoruba man, had been seized as a slave when he was young and taken to Brazil. In Brazil, he married a woman under two forms of marriage: first in accordance with Islamic law and then a Christian (or statutory) marriage. They gave birth to two children. The deceased returned to Nigeria with his first wife and married

[67] ibid, 84.
[68] (1942) 8 WACA 108.
[69] (1943) 17 NLR 55.
[70] (1943) 17 NLR 55.
[71] (1985) 3 NWLR 372.
[72] ibid, 390.
[73] ibid, 391.
[74] (1900) 1 NLR 41.

another woman under Islamic law. The deceased and his second wife gave birth to the plaintiff. Upon the death of the deceased, the plaintiff claimed to be entitled to a share of the deceased's estate. The Divisional Court dismissed the plaintiff's case. On appeal, the [then] Full Court allowed the appeal by distinguishing the decision in *Cole*. The Full Court did not agree that the deceased and his first wife had *in reality* contracted a Christian marriage, and, rather, believed that they were Muslims who contracted a Christian marriage simply for local reasons.[75] In the alternative, the Full Court held that, assuming the Christian marriage was valid, the deceased's first wife, having acquiesced to the deceased marrying a second wife, had a relationship with the deceased governed by Islamic law so that it would be unjust to disentitle the plaintiff from a share in the deceased's estate.[76]

In *Smith v Smith*,[77] the deceased contracted a Christian marriage in Sierra Leone in 1876. The deceased subsequently resided in Lagos and purchased property. The deceased died intestate, and after his death, the deceased's widow and children occupied the property. The daughters of the deceased, relying on customary law, subsequently brought an action for partition. The defendant, who was the deceased's eldest male child, opposed the action on the basis that under English common law, he was the deceased's heir at law and was therefore exclusively entitled to the property. He relied on *Cole* to the effect that English law governed the intestate succession because his parents had contracted a Christian marriage. The court dismissed the plaintiffs' case and questioned the authority of *Cole*. Van Der Meulen J, speaking for the court, observed that:

> Counsel appearing for the defendant has based his claim solely upon the decision in the case of *Cole v Cole* and has contended that the effect of that decision is to lay it down as binding rule that when parties married according to the rites of the Church of England their property must devolve according to the English law and not according to native law and custom.
>
> I have carefully perused that decision and I am unable to find that any such general rule is laid down thereby; I do not consider that the case goes further than to decide that in such cases it might be inequitable for native law and custom as to succession to property to be applied. It would be quite incorrect to say that all the persons who embrace the Christian faith, or who are married in accordance with its tenets, have in other respects attained the state of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws

[75] 'I do not admit that the parties in this case contracted a Christian marriage at all. They were Mohammedans and they merely for local reasons went through the marriage ceremony in Christian form'. – *Onikepke v Goncallo* (1900) 1 NLR 41, 44 (Speed, ACJ).

[76] 'But it may fairly be argued that assuming the marriage to be legal, still it would be contrary to justice that, Selia (the first wife) having impliedly contracted her Christian marriage for monogamy, her offspring should suffer breach of that contract by their father. But the contract with a Christian marriage would ordinarily imply was clearly not implied in the present case as Selia not only went through a Mohammedan ceremony of marriage but does not appear to have raised the slightest objection to her husband's subsequent marriages and wives'. *Onikepke v Goncallo* (1900) 1 NLR 41, 43 (Griffith, J).

[77] (1924) 5 NLR 105.

> and standards. Any such general proposition would in my opinion be no less unjust in its operation and effects than the converse proposition – with which I think the court must have been concerned in the case of *Cole v Cole* that because a man is a native the devolution of his property must be regulated in accordance with native law and custom, irrespective of his education and general position in life.[78]

Similarly, in *Onwudijoh v Onwudijoh*,[79] the deceased contracted a statutory (or Christian) marriage with his first wife. The deceased subsequently went through another marriage under native law and custom with another woman. One of the issues before the Court was the rights of the children of the deceased (from the statutory and customary law marriages) to the estate of the deceased. Sir Louis Mbanefo CJ, speaking for the Court, distinguished *Cole* to the effect that:

> Were I to follow the long line of cases based upon the decision in *Cole v Cole*, there would be little difficulty. The Full Court in Cole's case laid down the proposition that a Christian marriage, to quote the words of Sir Branford Griffith, 'clothes the parties to such marriage and their offspring with a status unknown to native law.' Native law and custom does not then apply to such marriages, and succession to the parties to such marriages is therefore to be governed by English law. That resumé of the decision erred on the side of simplicity, but the propositions stated I think are propositions which had been repeatedly extracted from the case and followed by the courts in this country.[80]

In *Olowu v Olowu*,[81] Oputa JSC, in *obiter dicta* (and contrary to the view expressed by Bello CJN), qualified the decision in *Cole* to the effect that

> in *Cole v. Cole* … the issue was whether Customary Law or English Law was the applicable law. From the facts and circumstances of that case, it was held that English law of succession will prevail over Customary Law. Much will therefore depend on the facts and circumstances of each individual case.[82]

Nwabueze, a leading authority on the subject, in a detailed analysis of the decision in *Cole* and cases that follow it, strongly raises questions about the soundness of the decision:

> The learned judge therefore held English law to be applicable by virtue of the Christian marriage, without factually ascertaining the life-style of the deceased, Cole, during his life time. Did the deceased live and conduct himself like a monogamously married Englishman? Could the deceased, a Nigerian native married in 1874, according to the report, be said to have been aware of and intended the application to his estate of the English law of intestate succession? Was it not obvious injustice to apply [to] a man's estate a law with which he, the deceased, had no connections other than regulating the celebration of his marriage?[83]

[78] ibid.
[79] (1957–58) 11 ERLR 1. See also *Ajayi v White* (1946) 18 NLR 41.
[80] *Onwudijoh v Onwudijoh* (1957–58) 11 ERLR 1.
[81] (1985) 3 NWLR 372.
[82] *Olowu v Olowu* (1985) 3 NWLR 372, 402–3.
[83] Remigius Nwabueze, *The History and Sources of Conflict of Laws in Nigeria: With Comparisons to Canada* (Germany, VDM Verlag, 2009) 112. See also *Haastrup v Coker* (1927) 8 NLR 68; *The Administrator General v Egbuna* (1945) 18 NLR 1 where the same decision was reached.

As argued above, the answer to the learned author's rhetorical questions might be found in the fact that the Court in *Cole* was probably influenced by Section 41 of the Marriage Ordinance 1884. The observation of Nwabueze might be one the Nigerian legislators may take into account in the future for the purpose of reform, having regard to the fact that (as stated earlier) the decision in *Cole* has now been codified in some States in Nigeria.

The above statement leads to the third issue, which involves the significance of *Cole* to Nigerian jurisprudence. It is submitted here that, subject to statutory limitations and other limited exceptions (depending on the facts of the case), the decision in *Cole* (and its protégée cases), which had previously been codified under Section 41 of the Marriage Ordinance 1884, is the main rule on the law applicable to the properties of a deceased who dies intestate, and who is ordinarily subject to customary law but contracts a Christian or statutory marriage.

(b) Changing Personal Law to Another Personal Law

For the purpose of succession to the property of a deceased person who dies intestate, the deceased, while he or she was alive, could change his or her personal law to another personal law. In other words, the deceased, while he or she was alive, can change the customary law that he or she was ordinarily subject to into another system of customary law. The *locus classicus* on this subject is *Olowu v Olowu* ('*Olowu*').[84] In that case, one Chief Olowu (the 'deceased') was a Yoruba man by birth and ordinarily subject to a form of Ijesha customary law. He lived most of his life in Benin City, Bendel State (now Edo and Delta State). He married a Benin woman who gave birth to the children, who were the plaintiffs and defendants in this case. In 1942, the deceased applied to the *Omo N'oba of Benin* (the traditional Ruler of Benin) to be 'naturalised' as a Benin citizen. His application was granted. The change of status of the deceased person enabled him to acquire immovable property in the then Bendel State. The deceased died intestate in 1960. The defendants, two of his children, were granted letters of administration to administer the deceased's estate. The first defendant distributed the estate in accordance with Benin customary law, but the other children – the plaintiffs and the second defendant – were dissatisfied and claimed that the estate ought to have been distributed according to Ijesha customary law rather than Benin customary law.

The plaintiffs brought an action against the defendants in the High Court to, *inter alia*, set aside the distribution according to Benin customary law and obtain a declaration that Ijesha customary law was the applicable law. The plaintiffs' case was dismissed both at the High Court and the Court of Appeal. The plaintiffs' further appeal to the Supreme Court was also dismissed.

The principal issue before the Supreme Court was whether Ijesha customary law or Benin customary law was the applicable law in relation to the distribution

[84] (1985) 3 NWLR 372.

of the estate of the deceased. The Supreme Court unanimously concluded that the deceased, by validly changing his personal law from Ijesha customary law to Benin customary law while he was alive, resulted in Benin customary law being the law that governs the deceased's estate.

Though the Supreme Court's finding in *Olowu* was unanimous, the reasoning of the Supreme Court Justices for not applying Ijesha customary law was not.[85] First, Oputa JSC[86] and Bello CJN[87] drew an analogy between *Olowu* and *Cole* to the effect that a person can change his or her personal law for the purpose of succession to his or her estate. Obaseki JSC also appeared to adopt a similar position when he submitted that:

> The history of population movement in this country, Nigeria, bears testimony that people moved from place to place before the advent of Europeans. They settled and became assimilated into the community. The present dynasty of the Obas of Benin, the repository of Benin native laws and customs, bears eloquent testimony that a Yoruba man can become a Benin man subject to Benin native laws and customs. The acceptance by the Oni of Ife of the request of the Chiefs of Benin to allow his son Prince Oronmiyan to ascend the throne of Benin and the acceptance by Prince Oronmiyan to become the Oba of Benin are historical facts. Similarly, the sojourn of Prince Oronmiyan to Benin City for that purpose … is also a historical fact. His decision to return home and ceding the throne for his son by a Benin Queen, Eweka I, who was brought up in the tradition of the people is also a historical fact.[88]

Second, it was unclear whether the Supreme Court Justices applied Benin customary law to govern the estate of the deceased who died intestate *simply* because it had become the personal law of the deceased,[89] such that the personal law of the deceased was being applied as a connecting factor in this case. Thus, Coker

[85] *Cf* 'As a general principle of law, succession to immovable is governed by the *lex situs*, that is, the law of the place where the land is situated. In this case, the customary law of the Benin people. The plaintiff's case was that the distribution which purported to be in accordance with Benin customary law should be nullified and, that of the Ijesha customary law should be substituted. No expert was called to say what is and why Ijesha customary law of distribution and succession to land should be applied. Here again, there was complete lack of evidence or decided cases in support of the proposition which the Plaintiffs contended. For the above reasons the Plaintiffs' case must fail and their appeal must be dismissed.' – *Olowu v Olowu* (1985) 3 NWLR 372, 387 (Coker JSC); 'the issue of personal law in the nature of native law and custom is not a matter for the constitution but has always been a question of fact to be proved by evidence … In that context the Court of Appeal had, therefore, no obligation to determine the proper law applicable to the estate of (*sic*) in dispute. The exercise had been carried out by the trial court whose function it was to determine questions of fact. On the evidence before it the High Court found that the deceased before his death, changed his status from that of Yoruba to that of Bini. It followed therefore that the Bini Customary Law of inheritance would apply to the distribution of his estate since he died intestate.' – *Olowu v Olowu* (1985) 3 NWLR 372, 400 (Uwais JSC).

[86] *Olowu v Olowu* (1985) 3 NWLR 372, 402–3.

[87] ibid, 391.

[88] ibid, 394–95.

[89] Though this appears to be the inference that could be drawn from the reasoning of the Supreme Court Justices.

JSC, in his 'leading judgment',[90] actually applied the *lex situs* to the effect that the applicable law was Benin customary law.[91] Oputa JSC, in his concurring judgment, appeared to apply the principle of the closest connection and exclusion of *renvoi* to the effect that:

> The principle is that the children of the late A.A Olowu will not be allowed to take advantage of and enjoy the properties acquired by their father as a Bini man while in the same breath denying his Bini Status and asking the court to apply as it were, the '*Renvoi doctrine*' which will send the matter back to Yoruba Customary Law for determination. If A.A Olowu's personal law, his *lex patriae*, Yoruba Customary law, is excluded as it ought to be on the facts and surrounding circumstances of this case, then the *lex situs*, the *lex loci*, the *lex domicilli* and the *lex fori* all point to Bini Customary law in the Bendel State of Nigeria.[92]

Despite the varied approaches taken by the Nigerian Supreme Court Justices, *Olowu* is the leading authority for the proposition that a person can change his or her personal law from one system of customary law to another system of customary law for the purpose of succession to his or her property.

(c) Changing Personal Law under the Statutes

Where a person who was ordinarily subject to customary (or Islamic law) contracts a statutory (or Christian) marriage, the law that governs the estate of that person is no longer customary law, but rather the applicable State statute – the 'Administration of Estates Law'. The 'Administration of Estates Law' does not apply to persons who contract a customary or Islamic law marriage.

Prior to the Supreme Court's decision in *Salubi v Nwariaku* ('*Salubi*'),[93] it was uncertain which law applied to the estate of a deceased person who was ordinarily subject to customary law (or Islamic law) but contracted a statutory (or Christian) marriage. In *Salubi*, the deceased died intestate on 19 September 1982, and was survived by his widow (whom he married under the Marriage Ordinance in force at the time), two children that he had with the widow, and by two other children born out of wedlock (whose paternity he acknowledged with the consent of his lawful wife). The deceased died, leaving a substantial estate comprising, *inter alia*, immovable property both in Lagos and the then Bendel State (now comprising Edo and Delta State). The defendant-appellant was the first son of the deceased.

[90] The quotation mark is used here because the learned justice reached the judgment by applying the *lex situs* instead of the personal law of the deceased person. None of the Justices of the Supreme Court dissented in this case.

[91] 'As a general principle of law, succession to immovables is governed by the *lex situs*, that is, the law of the place where the land is situated. In this case, the customary law of the Benin people.' – *Olowu v Olowu* (1985) 3 NWLR 372, 387.

[92] *Olowu v Olowu* (1985) 3 NWLR 372, 405.

[93] (2003) 7 NWLR 426.

Upon the death of the deceased intestate, letters of administration were granted to his widow (the 'first plaintiff-respondent') and the defendant-appellant. The widow, however, declined to be an administrator of the estate.

Dissatisfied with the manner in which the defendant-appellant had been managing the deceased's estate, the first plaintiff-respondent sued the defendant-appellant and prayed for orders to set aside the letters of administration granted to the defendant-appellant and that the estate of the deceased be distributed to all the beneficiaries of his estate in accordance with the 'Administration of Estates Law', which governs the estate of a person whose marriage is regulated by the 'Marriage Ordinance'. The first plaintiff-respondent also prayed for an order compelling the Probate Registrar (the 'second respondent') to effect the distribution of the estate of the deceased to all the beneficiaries as ordered by the court. The first plaintiff-respondent's case was that the deceased, having contracted a Christian marriage under the 'Marriage Ordinance', was not a person to whom native law and custom applied, with the consequence that, applying English law, his widow was entitled to two-thirds share of his estate.

The defendant-appellant contended that because the deceased had lived and died as an Urhobo Chief, his estate should be distributed in accordance with Urhobo native law and custom, under which he (as the deceased's eldest son) inherited the deceased's property, which could be distributed at his discretion.

The trial court held that the estate was not to be administered in accordance with either the Administration of Estates Law or native law and custom, but rather as provided for in Section 36(1) of the Marriage Ordinance. The Court rationalised its judgment on the basis that the deceased, having contracted a Christian marriage under the Marriage Ordinance, was a person who was no longer subject to native law and custom. The trial court also held that it preferred Section 36(1) of the Marriage Ordinance to the Administration of Estates Law because the Marriage Act is a Federal law and therefore overrides State law dealing with the administration of estates of persons dying intestate.

The defendant-appellant appealed and the plaintiff-respondent cross-appealed. The Court of Appeal allowed both appeals to the effect that English law, as stated in Section 36(1) of the 'Marriage, Cap. 115, Laws of the Federation', was the applicable law on the basis that it had been in force for many years and had not been expressly repealed by the legislature. Suffice it to state that a differently constituted Court of Appeal in a related case, *Obusez v Obusez* ('*Obusez*'),[94] departed from the Court of Appeal's decision in *Salubi* and held that the applicable law was not Section 36 of the Marriage Act but Section 49 of the Administration of Estates Law.

On further appeal to the Supreme Court, the Supreme Court allowed it and applied Section 49 of the 'Administration of Estates Law, Cap 2 Vol. 1, Laws of Bendel State, 1976.' Ayoola JSC, in his leading judgment (with whom other Justices

[94] (2001) 15 NWLR (Pt. 736) 377.

of the Supreme Court concurred), provided a brilliant exposition of the law as to why he reached this conclusion. Ayoola JSC explained that between 1914 and 1958, when Nigeria passed through a constitutional phase from a unitary to a Federal system of government, matters of succession had been removed from both the exclusive legislative list and concurrent list and was placed on the residual list so that matters of succession were within the exclusive legislative competence of the State legislature.[95]

> He stated that the [then] Western Region of Nigeria, out of which the [then] Mid-West State (which was later named Bendel State of Nigeria) was carved, enacted its Administration of Estates Law in 1959. It was common knowledge that the enactment of the said Administration of Estates Law was a product of the policy of the [then] Western Region to 'modernise' its laws by substituting regional laws for Statutes of General Application in force in England on 1 January 1900.[96] In reality, the sources of several of the provisions of the Administration of Estates Law, both of the former Western Region of Nigeria and of the former Bendel State were the provisions of the English Administration of Estates Act, 1925 and of English statutes later than 1925 amending or adding to them.[97]

The implication of the Nigerian State(s) legislature's enactment of the Administration of Estates Law was such that 'if there was a conflict between the English common law on the distribution of intestate estate and the provisions of the Administration of Estates Law, the latter must prevail.'[98]

Flowing from the above, Ayoola JSC held that recourse to Section 36(1) of the Marriage Act was 'neither justified nor necessary.'[99] He admitted, however, that Section 36(1) of the Marriage Act was similarly worded to Section 49(5) of the Administration of Estates Law, which latter statute provides that:

> Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or any issue of such marriage, *any property* of which the said intestate might have disposed by will shall be distributed in *accordance with the provisions of this Law*, any customary law to the contrary notwithstanding (emphasis added by Ayoola JSC).[100]

[95] *Salubi v Nwariaku* (2003) 7 NWLR 426, 450–51.
[96] Best described in the preface to the Laws of Western Region of Nigeria, 1959 as follows:

> 'This policy included the substitution of Regional Law for such of those statutes of general application in force in England on 1st January, 1900, and as such in force in the Region, as were deemed appropriate to the present circumstances of the Region and dealt with as matters within the competence of its legislature. Bills to give effect to this policy were prepared by the Commissioner and were enacted for inclusion in the present edition of the Laws of the Region.' – Ayoola JSC in *Salubi v Nwariaku* (2003) 7 NWLR 426, 450.

[97] *Salubi v Nwariaku* (2003) 7 NWLR 426, 450 (Ayoola JSC).
[98] ibid, 451 (Ayoola JSC).
[99] ibid, 453 (Ayoola JSC).
[100] ibid, 453 (Ayoola JSC).

Ayoola JSC further elaborated on the slight difference between Section 36(1) of the Marriage Act and Section 49(5) of the Administration of Estates Law to the effect that:

> The only difference in the two provisions is that while section 36(1) of the Marriage Act incorporated English law (fixed at the date of the enactment 1914) into our laws of intestate succession by reference, the later statute has directly and not by reference substantially incorporated the contents of the then current English law on the subject in its provisions with the consequence that it was not necessary to search for what the English law on the matter was. The source of Section 49(5) was itself Cap. 115 of the Laws of the Federation and Lagos, 1958 modified to signify the end of incorporation of English law by reference. The provisions of section 49(5) of the Administration of Estates Law, particularly in the portion rendered in italics in the quotation above, leave no room for any doubt that the estate in this case fell to be distributed in accordance with the 'provisions of this Law', that is, the Administration of Estates Law and not English law or customary law.[101]

If one thought that the Supreme Court's decision in *Salubi* settled the controversy once and for all, the Court of Appeal's decision in *Obusez* was challenged before the Supreme Court and counsel for the defendant-appellant invited the Supreme Court to overrule its decision in *Salubi.*

In *Obusez*, the deceased was married to the first plaintiff-respondent under the Marriage Act. They were both from Delta State. They gave birth to five children. It was rumoured that the deceased and the first plaintiff-respondent had a troubled relationship, so that when the deceased died by assassination, the first plaintiff-respondent was among the persons charged with the assassination of the deceased person. The charges against the plaintiff-respondent were eventually dropped.

The deceased was also survived by the defendant-appellants, who were his full brothers. The first defendant-appellant was the deceased's twin brother. The deceased was buried in the personal residence of the first defendant-appellant. In his lifetime, the deceased took out a life insurance policy in 1977 where he named his first and second children and the first defendant-appellant as beneficiaries of his estate.

The first plaintiff-respondent instituted an action at the High Court of Lagos State, Ikeja against the defendant-appellants seeking a declaration that she and her five children were the only persons entitled to the deceased's estate, and an order that the grant of letters of administration in solemn form for the administration of the estate be issued to the plaintiff-respondents. The plaintiff-respondents' case succeeded both at the trial court and Court of Appeal. On further appeal to the Supreme Court, counsel for the defendant-appellants invited the Supreme Court to depart from *Salubi* on the basis that the incidence of marriage (excluding Islamic law and customary law marriage) under the Marriage Act on a surviving

[101] ibid, 453–54.

spouse, upon which the decision was based, is a matter which falls within Items 60 and 67 of the Exclusive Legislative List 1979 (which are Items 61 and 68 on the Exclusive Legislative List in the 1999 Constitution, Second schedule, Part 1) so that the State legislature could not legislate in that area of the law. It was thus argued that Section 49(5) of the Administration of Estates Law of Lagos State, which is equivalent to Section 36 of the Marriage Act, was null and void, and therefore, the customary law of Agbor should apply to the administration of the estate of the deceased person, by virtue of which the deceased's brothers (the appellants) ought to have priority for appointment as administrators of the estate.

The Supreme Court unanimously rejected the appeal and contentions of the counsel for the defendant-appellants, and instead agreed with the plaintiff-respondents' submissions. Tabai JSC, in his leading judgment, stated the following:

> I have examined the above provisions carefully and I am of the view that section 49(5) of the Administration of Estates Law Lagos State does not purport to legislative [*sic*] on matters preserved for the National Assembly in items 60 and 67 of the Exclusive Legislative List in the 1979 Constitution. Section 49(5) of the Administration of Estates Law deals specifically with 'succession to real and personal estate upon intestacy' as [is] clearly shown in the caption or head note. While item 60 on the Exclusive Legislative List also speaks specifically of the formation, annulment and dissolution of marriage other than Islamic Law and/or Customary Law, the Constitutional provisions in items 60 of the Exclusive List, in my view, pertain and [*sic*] limited to the formation, annulment and dissolution of marriages and cannot be expanded to cover cases of succession to, distribution and administration of the estate of an intestate. Similarly, I do not think that item 67 of the Exclusive Legislative List of the 1979 Constitution can be construed to include matters beyond those specifically mentioned in item 60.
>
> These specific and unambiguous provisions both of the Constitution and the Administration of Estates Law of Lagos must be accorded their ordinary grammatical meaning which alone speaks and discloses the intention of the law makers … In my view the construction of the Constitutional and Statutory provisions does not affect the decision on *Salubi v. Nwariaku* and there is therefore no basis for any departure there from.[102]

Tobi JSC held that 'Section 49(5) does not legislate on incidence [*sic*] of marriage but on succession to property of a person who dies intestate. There is a world of difference between the two and they cannot be put together.'[103]

Onnoghen JSC also held that:

> Both sections 36(1) of the Marriage Act and Section 49(5) of the Administration of Estates Law of Lagos State deal with succession to intestate property and have nothing to do with any form of marriage settlement or incidence of marriage and that section 49(5) in particular has nothing to do with matters falling within the exclusive legislative list under the 1979 Constitution particularly items 60 and 67 thereof. The facts of this case being as they are, there is no basis for the invitation by learned counsel for the appellants

[102] *Obusez v Obusez* (2007) 10 NWLR 430, 446.
[103] ibid, 451.

> for this court to revisit its decision in the case of *Salubi v Nwariaku supra* as the facts and principles of law stated therein are applicable to the facts and principles of law relevant to the determination of the instant case. The deceased by contracting marriage under the Act opted out of the system of Customary Law of succession in case of intestacy.[104]

By way of analogy, the Supreme Court's decisions in *Salubi* and *Obusez* apply to States of the Federation whose laws are *in pari materia* with the Administration of Estates Law of the former Western Nigeria.[105]

Nwogugu (a leading expert on family law in Nigeria), after a detailed study of the laws in other States in the Federation, reaches the converse conclusion that:

> The administration laws do not apply to the estates of persons who married under customary law and died intestate or to estates governed by Islamic law.
>
> Furthermore, the laws apply in respect of the administration of estates of persons who died having been married under a monogamous marriage. Only in the Anambra model does it apply to a person who during his life time was not subject to customary law.[106]

Indeed, the conclusion reached by the learned author is no different from the position earlier taken by the Supreme Court to the effect that the Administration of Estates Law does not apply to the estate of a person who contracts a customary or Islamic law marriage.[107]

III. Jurisdiction Relating to Foreign Property

In matters of succession, the *lex situs* is given a predominant role for choice of law and jurisdiction purposes so that a Nigerian court would ordinarily not assume jurisdiction over foreign property. Nigerian courts, as an exception, apply the rule to the effect that, where the Court has jurisdiction to administer an estate or trust, and the property includes movables or immovables situated in England and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purpose of administration. Nigerian courts apply this rule both in inter-State and international matters.

The Supreme Court applied this rule in *Ogunro v Ogedengbe*.[108] In that case, the deceased owned land in Lagos and in Ghana. The applicant administrators took

[104] ibid, 461.

[105] See Section 3(2) of the Administration of Estates Law Oyo State; Section 3(2) of the Administration of Estates Law Sokoto State; Section 1(1)(a) of the Administration of Estates Law Rivers State; Section 1 of the Administration of Estates Law Cap A1 Laws of Bayelsa State 2006; Section 1 of the Administration of Estates Law Cap 2 Laws of Akwa Ibom State 2000; Section 3 of the Administration of Estates Law Rivers State; Section 71 of the Anambra State Administration and Succession (Estates of Deceased Persons) Law; Section 71 of the Enugu State Administration and Succession (Estates of Deceased Persons) Law Cap 5 Laws of Enugu State 2004.

[106] See generally EI Nwogugu, *Family Law in Nigeria*, 3rd edn (Revised Edition (Ibadan, HEBN Publishers Plc, 2014) 411.

[107] *Zaidan v Mohssen* (1973) 1 All NLR 86, 98, 101; *Olowu v Olowu* (1985) 3 NWLR 372, 382, 395.

[108] (1960) 5 SC 137.

out a summons for directions on who was entitled to his estate and for an order of distribution. Counsel for the opposing party, *inter alia*, contended that the Court had no jurisdiction to deal with property in Ghana. The trial judge rejected counsel's objection and assumed jurisdiction. On appeal, the Supreme Court dismissed the appeal and held that, as the court below had jurisdiction to administer the estate, it had jurisdiction to determine questions of title to property in Ghana for the purpose of the administration.[109]

In *Salubi v Nwariaku* (discussed earlier),[110] the Supreme Court, in affirming the decision of the Court of Appeal, followed its decision in *Ogunro v Ogedengbe* to the effect that the High Court of a State has jurisdiction to entertain an action arising from the administration of the estate of a deceased person who died intestate, notwithstanding that the letters of administration are in respect of properties within the State while the estate includes properties outside the State.[111]

IV. Constitutional Law and Human Rights

Matters of succession and administration of estates usually have a strong confluence with constitutional law and human rights. Internal conflict of laws problems are generated due to the pluralistic nature of the Nigerian legal system, and the continued validity of some indigenous native laws and customs has been questioned. There is also a lack of consensus among Nigerian judges as to whether they should be conservative in upholding ancient customs or be more progressive in declaring invalid customs which do not meet human rights norms.

A. Legitimacy

A person is the legitimate child of his or her parents if such a person is born during wedlock. It has been held by the Supreme Court that for the purpose of determining the legitimacy of a child born during wedlock, a valid marriage includes statutory (or Christian marriage), customary, and Islamic law marriage.[112]

Under the Evidence Act, where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of that man.[113] Native laws and customs vary on the question of the legitimacy of a child. Under Islamic law, there

[109] See also *Azie v Azie* (2016) 5 NWLR 593, 613–14 (Husaini JCA); *Clark v Togonu-Bickersteth* (2018) LPELR-44096 (CA) 11–15 (Obaseki-Adejumo JCA).
[110] (2003) 7 NWLR 426.
[111] *Salubi v Nwariaku* (2003) 7 NWLR 426, 448, 456 (Ayoola JSC).
[112] *Lawal v Younan* (1961) 1 All NLR 245, 250 (Ademola CJN).
[113] Evidence Act, 2011 s 165.

is the presumption of legitimacy if a child is born within the minimum period prescribed and accepted for a normal birth.[114]

Section 42(2) of the 1999 Constitution (as amended) provides that no person shall be subject to any disability or deprivation by reason of the circumstances of his or her birth. This constitutional provision was initially Section 39(2) of the 1979 Constitution. An explanatory report to this constitutional provision states the following:

> There is no doubt that all of us have had no choice, nor were we given an option, as to who would be our parents before we were born. If we were given an option, I am sure that there will be none of us who would prefer to be born by wretched parents, to be born of a slave or even to be born by prostitutes. We would prefer to be born by people who are legally married. The amendment is saying that on no account should a person be discriminated against merely by reasons of circumstances of his birth.[115]

Prior to the enactment of Section 42(2) of the 1999 Constitution, the issue of legitimacy as a matter of substantive law was a controversial one. The Supreme Court's decision in *Cole v Akinyele* ('*Akinyele*')[116] was previously the authority on the subject. The *Akinyele* case related to the status of children of one Albert Abimbola Cole, deceased, who was married under the Marriage Ordinance (now Marriage Act) and had two children by another woman – one born during the wife's lifetime and the other shortly after her death. He acknowledged both of them as his children. It was held that with regards to the child born during the continuance of the marriage of the deceased to a wife under the Marriage Ordinance, it would be contrary to public policy to enable him to recognise the child as legitimate by any other method than the one prescribed in the Legitimacy Ordinance. Regarding the other child, that is, the one conceived during the currency of the marriage but born after the death of the wife, it was held that there was no principle of public policy to exclude the rule under which he, as the acknowledged son of his father, who was born at a time when his father was free to marry, could be regarded as legitimate.[117]

With the enactment of Section 42(2) of the 1999 Constitution (as amended), no person can be subjected to any form of disability or deprivation because such a person was born out of wedlock. Nigerian appellate courts in decided cases have applied this provision to the effect that the fact that a person is born out of wedlock does not deprive him or her of the right to succeed the estate of a deceased person.[118] In *Salubi v Nwariaku*[119] (discussed earlier), one of the issues before the

[114] *Rabiu v Amadu* (2013) 2 NWLR 36.

[115] Mr JO Aghiemien, Proceedings of the Constituent Assembly, (Official Report) Vol. III p. 2346, columns 7664–7665, Federal Ministry of Information, Printing Division, Lagos 36 (1932) II NLR 47.

[116] (1960) 5 FSC 84.

[117] See also *Ogunmodede v Thomas*, Supreme Court FSC 337/1962; *Osho v Philips* (1972) 1 All NLR 276.

[118] See also *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15 (Fabiyi JCA as he then was); *Anonde v Mmeka* (2007) LPELR-CA/PH/72/2003 15–18 (Saulawa JCA).

[119] (1997) 5 NWLR (Pt. 505) 442.

Court of Appeal was whether the children born out of wedlock could inherit from their father's estate. The Court of Appeal unanimously answered in the affirmative by applying the provisions of the Constitution. Ige JCA (in a concurring judgment), courageously held that

> [u]nder our law and the provisions of the Constitution of the Federal Republic of Nigeria 1979 they are lawful children and entitled as beneficiaries under the estate of their late father … the decision in *Cole v Akinyele* … is no longer the law.[120]

On appeal to the Supreme Court, the decision of the Court of Appeal was confirmed to the effect that issue of a deceased person who died intestate, who were born out of wedlock, are entitled to inherit the deceased's estate.[121]

In *Ukeje v Ukeje*,[122] the Supreme Court held that:

> The trial court, I hold did rightly declare as unconstitutional, the law that dis-inherits children from their deceased father's estate. It follows therefore that the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate is conflicting with section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).[123]

The implication of the Nigerian jurisprudence on the subject is that any customary law (or other applicable law) that deprives a child born out of wedlock from inheriting from the estate of the deceased person is null and void, and of no effect.

B. Gender Discrimination

In matters of succession, some native laws and customs in Nigeria discriminate against the rights of women to inherit the property of a deceased person.[124] Thus, in *Ugboma v Ibeneme*,[125] the deceased, a native of Awkuzu in the then Anambra

[120] *Salubi v Nwariaku* (1997) 5 NWLR (Pt. 505) 442, 477.

[121] Ratio 10 of the report reads: 'Issues of a deceased person who died intestate born out of wedlock during the subsistence of his marriage *but whose paternity he acknowledged in his lifetime* are entitled to share in the estate of the deceased equally with the issues of the lawful marriage. This is in accord with section 39(2) of the 1979 Constitution [now Section 42(2) of the 1999 Constitution]. In the instant case, the Court of Appeal was right to have found that the two children of the deceased born out of wedlock are entitled to share equally in the estate of their late in conformity with the provisions of section 39(2) of the 1979 Constitution'. *Salubi v Nwariaku* (2003) 7 NWLR 426, 448, 456, 458–59 (emphasis added). Interestingly, the judgment of the Supreme Court Justices (contrary to what was contained in the ratio) did not contain the qualification that the deceased must acknowledge the children born out of wedlock during his lifetime.

[122] (2014) LPELR-22724 (SC).

[123] *Ukeje v Ukeje* (2014) LPELR-22724 (SC) 37.

[124] On women's rights in Nigeria see generally E Ekhator, 'Women and the Law in Nigeria: A Reappraisal' (2015) 16 *Journal of International Women's Studies* 285–96; E Ekhator, 'Protection and Promotion of Women's Rights in Nigeria: Constraints and Prospects' in M Addaney (ed), *Women and Minority Rights Law: African Approaches and Perspectives to Inclusive Development* (Eleven International Publishing, Netherlands 2019) 17–35.

[125] (1967) FNR 251.

Local Government Area, died intestate, leaving immovable property in Onitsha. He was survived by two sons and several daughters. The plaintiffs in this case were his second son and sixth daughter. The first defendant was the eldest son of the deceased. The first defendant had sold the property in dispute to the second defendant. The plaintiffs challenged the conveyance on the basis that all the children of the deceased person jointly owned the property and it could not be solely conveyed by the first defendant. The learned judge held that, in accordance with the general Igbo custom, which was also the custom the deceased was subject to – Awkuzu women are not entitled to inherit land from their father. Consequently, the female plaintiffs had no *locus standi* in the action.

A customary law could be declared invalid under Nigerian jurisprudence where it violates human rights norms. The validity of discriminatory customs which deprive women of the right to succeed to the estate of a deceased person is open to challenge on two main grounds. The first is the 'repugnancy test', which Nigeria inherited into its legal system from the colonial administration. The second and more effective ground is through the provisions of the Nigerian Constitution. The repugnancy test and constitutional provisions are not mutually exclusive; they can be utilised together or in the alternative.

It is useful to note that Nigerian courts may be reluctant to declare a custom repugnant because of the 'offensive' nature of the word. It would be easier to ground a decision on Section 42(2) of the 1999 Constitution which, unlike the repugnancy test, does not necessarily pass any judgment on the custom at issue. Nigerian judges have not been consistent in using the repugnancy test to protect the rights of women against discrimination from the right to succeed to the estate of a deceased person. For example, the custom of the *Igiogbe*, which exclusively reserves the house where the deceased lived and died to his eldest son, has not successfully been challenged as repugnant to natural justice, equity, and good conscience. In *Ogiamen v Ogiamen*,[126] the plaintiff, who was the eighth son of Chief Ogiamen (the 'deceased'), brought an action against the first defendant, who was his first son and heir. The claim was for a declaration that the first defendant had no right, under Bini customary law, to sell the property of their father, which was situated at Sakpomba Road in Benin City. An order to set aside the sale made to the second defendant was also sought. The plaintiff sued on behalf of himself and other members of the family. The deceased had died leaving three properties. It was common ground that according to Bini custom, the eldest son inherits all the father's property to the exclusion of the other children. The learned Judge rejected the custom as repugnant to natural justice, equity, and good conscience, and refused to be bound by it. The Supreme Court allowed the appeal. Ademola CJN, in *obiter*, observed that:

> It is common ground that according to Benin custom, the eldest son succeeds to all property of the father … This culture the learned judge dubbed as repugnant to natural justice, equity and good conscience, he refused to be bound by it. As it is not a point

[126] (1967) NWLR 245. Cited with approval by Belgore JSC (as he then was) in *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR 259, 276. See also *Idehen v Idehen* (1991) 6 NWLR 382, 402 (Kawu JSC).

> material to this appeal, we refrain from making comments on this except to say that it is not unknown in some highly civilised countries of the world.[127]

In *Idehen*,[128] Olatawura JSC observed that '[t]he Bini custom on this issue is well settled that to do otherwise than their custom is to brush aside an age-long custom. It may lead to chaos'.[129]

In *Lawal-Osula v Lawal-Osula*,[130] the Supreme Court was invited to declare the *Igiogbe* custom repugnant to natural justice, equity, and good conscience. The Supreme Court declined the invitation. Belgore JSC (as he then was), in defence of the *Igiogbe* custom, observed that:

> Binis, like some other tribes in Nigeria have got some age-long traditions and norms, some peculiar to them, others in common with the other races in other parts of the world that cannot easily be written off by a mere legislation. To legislate to ban some of these native laws and customs, would lead to serious disorder and that makes governance and obedience difficult. It is in the light of these that instead of entirely discarding a practice that has been tried and tested over centuries, legislation are carefully drafted to accommodate the laws and customs in question and to regulate their practice.[131]

Belgore JSC (as he then was), in his judgment, later held that:

> the Bini customary law of inheritance cannot be said to be repugnant to equity, good justice or indeed to natural justice. The inheritance under English law as relevant to succession to the seat and estate of a hereditary person – duke or earl – is not far different from Bini customary law. It is designed to keep family tradition and maintain orderly continuity. The eldest son to inherit 'Igiogbe' is not incompatible with natural justice, equity and good conscience.

Ogundare JSC tentatively observed that:

> This court has held on a number of occasions (and we have not been invited in this appeal to reconsider that decision with a view to setting it aside) that the 'Igiogbe', that is the house where a Bini deceased lived and died devolves on his eldest surviving male under Benin Customary Law. I do not want to proffer any views as to whether this custom is repugnant until such occasion when we are invited to reconsider our previous decisions on it.[132]

In relation to the repugnancy test, another custom worthy of consideration is Nnewi native law and the custom of *Oli-ekpe* of Onitsha, Anambra State, which favours a male child inheriting the estate of a deceased person to the exclusion of women. The Court of Appeal has interpreted the *Oli-ekpe* custom to the effect that:

> Under the Nnewi native law and custom, if a man dies leaving a male issue, the property belongs to the male child. If on the other hand the deceased has no male issue, his

[127] *Ogiamen v Ogiamen* (1967) NWLR 245, 247.
[128] (1991) 6 NWLR 382.
[129] *Idehen v Idehen* (1991) 6 NWLR 382, 426.
[130] (1995) 9 NWLR 259.
[131] *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR 259, 272–73.
[132] ibid, 281.

> brother will inherit the property. If the male issue who survives the father dies leaving no male issue, the father's brother will inherit the property. If, on the other hand, the deceased's brother dies leaving sons, the sons will inherit the property of the dead cousin. In particular, the '*diokpala*', that is the eldest son of the uncle, will inherit the property. If a man dies and subsequently his only son and brother die, if the late brother has sons, the first son of the late brother will inherit all the property. The son of the late brother is called '*Oli-ekpe*' i.e. he inherited of his relation. The '*Oli-ekpe*' inherits the land, the wives of the deceased and if the deceased had daughters, he will give them in marriage. In other words, the '*Oli-ekpe*' inherits the assets and liabilities of the deceased. In the instant case, the appellant claims to be the '*Oli-ekpe*' entitled to the property of the deceased, to the exclusion of the respondent, who is the daughter of the deceased.[133]

In *Mojekwu*, the nephew of the deceased, based on the *Oli-ekpe* custom, sought to inherit the deceased's property to the exclusion of the deceased's female children. Though the Court of Appeal held that the *lex situs* was the applicable law, such that the *Oli-ekpe* custom was inapplicable in this case, the Court of Appeal went further to declare the *Oli-ekpe* custom repugnant to natural justice, equity, and good conscience. Tobi JCA (as he then was), in his strongly worded leading judgment, held that:

> We need not travel all the way to Beijing to know that some of our customs, including the Nnewi 'Oli-ekpe' custom relied upon by the appellant are not consistent with our civilised world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the Creator of human being, is also the final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-ekpe' custom of Nnewi, is repugnant to natural justice, equity and good conscience.[134]

The Court of Appeal, in a later and related case, upheld its decision in *Mojekwu* on the validity of the *Oli-ekpe* custom.[135] However, the *Mojekwu* case was appealed to the Supreme Court,[136] and the Supreme Court dismissed the appeal on the basis that the applicable law was the *lex situs* (Mgbelekeke family 'kola tenancy'), and not the personal law of the deceased. The Supreme Court's application of the Mgbelekeke family kola tenancy to the instant case allowed the deceased's daughters to inherit from their father's estate. Uwaifo JSC, in his leading judgment, went further to strike down the judgment of Tobi JCA (as he then was), which declared the *Oli-ekpe* custom repugnant to natural justice, equity, and good conscience:

> In the present case, because of the circumstances in which it was done, I cannot see any justification for the court below to pronounce that the Nnewi native custom of

[133] *Mojekwu v Mojekwu* (1997) 7 NWLR 283, 304.
[134] ibid, 305.
[135] *Mojekwu v Ejikeme* (2000) 5 NWLR 402; *Timothy v Oforka* (2008) 9 NWLR (Pt. 1091) 204.
[136] *Mojekwu v Iwuchukwu* (2004) 11 NWLR 196.

> '*Oli-ekpe*' was repugnant to natural justice, equity and good conscience. First, the issue that '*oli-ekpe*' was repugnant was not joined by the parties. Second, the court below having felt strongly about its repugnancy, as can be seen from the emotive and highly homilised pronouncement, was obliged to draw the attention of the parties to it, raise it *suo motu* and invite them to address the court on the point. Third, the court below itself had reached a conclusion that the applicable custom was that of the kola tenancy of the *lex situs*. This was said twice in the leading judgment, as recorded: once before the pronouncement in question and once after. The pronouncement, which was not necessary for deciding the suit, can thus be assessed upon the scenario in which it was made. Fourth, the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement is so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women; for instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practise by the system by which they run their native communities. It would appear, for these reasons, that the underlying crusade in that pronouncement went too far, so as to stir up a real hornet's nest, and would have doen so even if it had been made upon an issue joined by the parties, and properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.[137]

The second human rights ground, which has been more effective in protecting persons against deprivation (on the grounds of gender) of the right to inherit from the estate of a deceased person, is the provision of Section 42(1) of the 1999 Constitution, which protects against discrimination on the grounds of gender. In the case of *Mojekwu v Ejikeme*,[138] the plaintiff-appellants claimed to inherit the property in dispute of one Ruben Mojekwu (the 'deceased'). The deceased, who was married during his lifetime, was the father of Virginia and two other children who had died in 1938 and 1967. Virginia was unmarried when she gave birth to Chinwe in 1954 and Uzoamaka in 1956 (the third plaintiff-appellant). Chinwe was unmarried when she gave birth to Izuchukwu (the second plaintiff-appellant), and the third plaintiff-appellant, Uzoamaka, was unmarried when she gave birth to the first plaintiff.

The plaintiff-appellants relied on the *Nrachi* custom of Nnewi to the effect that it had been performed on Virginia by the deceased person. By the *Nrachi* custom, a man can keep one of his daughters unmarried perpetually under his roof to alleviate certain issues, especially that of a want of males to succeed him. With the custom performed on a daughter, she takes the position of a man in the

[137] ibid, 216–17.
[138] (2000) 5 NWLR 402.

father's house, technically becoming a 'man'. In effect, the *Nrachi* custom is used to 'cure' the defect of the *Oli-ekpe* custom so that a woman who undergoes the *Nrachi* custom now becomes a 'man' with the effect that her heirs can inherit from her father's estate just as a man would be able to.

The defendant-respondents contended that the *Nrachi* custom had not been performed on Virginia and thus relied on the *Oli-ekpe* custom to the effect that the deceased, not having been survived by any male child, and the defendant-respondents being distant male relatives of the deceased, were entitled to the estate to the exclusion of the plaintiff-appellants. The trial court held in the defendant-respondents' favour. An appeal to the Court of Appeal was unanimously allowed. The Court of Appeal, in very strong language and grandiloquent terms, condemned the *Oli-Ekpe* custom and held that such a custom discriminated against Virginia, and was therefore unconstitutional in light of the provisions of Section 42(1) of the 1999 Constitution. The Court of Appeal also held that the *Nrachi* custom was repugnant to natural justice, equity, and good conscience.[139] Interestingly though, Nigeria is not yet a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Tobi JCA (as he then was), in his concurring judgment, made reference to this human rights instrument in holding that the *Nrachi* custom was discriminatory against women.[140] In later cases, the Court of Appeal reaffirmed the decision in *Mojekwu v Ejikeme*.[141]

In *Timothy v Oforka*,[142] the plaintiff-respondents were grantees of land by their late grandfather. The plaintiff-respondents sought a declaration that the defendant-appellant violated their fundamental right to freedom from discrimination and the right to acquisition and ownership of property guaranteed by the 1999 Constitution. The defendant-appellant challenged their father's grant on the ground that it breached the Oraifite customary law which forbade women and children from dealing with land. The High Court and Court of Appeal both held in favour of the plaintiff-respondents by applying Section 42(1) of the 1999 Constitution and the repugnancy test. Denton-West JCA, in his leading judgment, held that:

> However, I will want to emphasize that the learned trial judge was not only right in his ruling/judgment but he adequately took the bull by the horn[s] and upheld the Constitution and was able to declare that a native law and custom that was repugnant to

[139] Reference was made to s 18(1) of the High Court Law of Anambra State, 1987 which provides that: 'The Court shall observe and enforce the observance of customary law and shall not deprive any person of the benefit thereto except when such customary law is repugnant to natural justice or incompatible either directly or by its implication with any written law from time to time in force in the state'. *Mojekwu v Ejikeme* (2000) 5 NWLR 402, 422–23 (Fabiyi JCA as he then was); 430–32 (Tobi JCA as he then was).

[140] *Mojekwu v Ejikeme* (2000) 5 NWLR 402, 432, 436 (Tobi JCA as he then was).

[141] *Amode v Nmeka* (2008) 10 NWLR (Pt. 1094) 1.

[142] (2008) 9 NWLR (Pt. 1091) 204.

> natural justice wherein some citizens of the country Nigeria are discriminated against on account of their place of origin, sex, religion or political opinion to hold property when such property was indeed also given by a grandfather to his daughter and son …[143]

In *Ukeje v Ukeje*,[144] Rhodes-Vivour JSC made the following *obiter* statements:

> Whether the respondent is a daughter of L.O. Ukeje (deceased). L.O. Ukeje deceased is subject to the Igbo Customary Law. Agreeing with the High Court the Court of Appeal correctly found that the Igbo native law and custom which disentitles a female from inheriting, in her late father's estate is void as it conflicts with sections 39(1)(a) and (2) of the 1979 Constitution (as amended). This finding was affirmed by the Court of Appeal. There is no appeal on it. The finding remains inviolate. Section 39(1)(a) [and] (2) of the 1979 Constitution is now contained in the 1999 Constitution as section 42(1)(a) [and] (2).[145]

In light of the approach taken by the appellate courts in protecting the rights of women against discrimination in relation to matters of succession, it might be open to question whether the *Igiogbe* custom (and similar customs modelled after it) is not ripe to be declared unconstitutional for violating Section 42 of the 1999 Constitution. Indeed, in the cases discussed in relation to the *Igiogbe* custom, the constitutionality of the custom was not raised before the Supreme Court. In this regard, Nigerian judges may benefit from the statement made by a South African Judge, Ngcobo J, who applied the South African Constitution in the protection of women to the effect that:

> Having regard to these developments on the continent, the transformation of African communities into urban and industrialised communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discrimination.
>
> This rule (primogeniture) might have been justified by the traditional social economic structure in which it developed. It has outlived its usefulness. In the present day and age, the limitation on the right of women to succeed to the position and status of family head, cannot be said to be reasonable and justified under section 36(1) of the constitution. It follows therefore that the rule of male primogeniture is inconsistent with section 9(3) of the constitution to the extent that it excludes women from succeeding to the family head.[146]

[143] *Timothy v Oforka* (2008) 9 NWLR (Pt. 1091) 204, 217.

[144] (2014) LPELR-22724 (SC).

[145] See also *Okoli v Okoli* (2002) LPELR-CA/E/138/99, 15; *Okonkwo v Okonkwo* (2014) 17 NWLR (Pt. 1435) 78; *Ugbene v Ugbene* (2016) LPELR-42110(CA) 64–67; *Okeke v Okeke* (2017) LPELR-42582(CA).

[146] *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) at [209]-[210].

V. Conclusion

This chapter has discussed the conflict of laws aspect of the succession and administration of estates in Nigeria, taking into account the pluralistic nature of the Nigerian legal system. It has been noted that a testator can dispose of his properties as he pleases, but under the Wills Law of some States of the Nigerian Federation, the power of the testator to devise his property is subject to customary law. Customary law is, in this sense, a mandatory norm on the subject of devising the testator's property.

Where a testator dies intestate, connecting factors play an important role in determining the law that applies to govern the estate of the deceased person. In this regard, Nigerian courts usually give special significance to the *lex situs* and the personal law of the deceased person.

A deceased person can change his or her personal law from one system of law to another system of law while he or she is alive. The concept of changing one's personal law was initially codified in Section 41 of the Marriage Ordinance, 1884 (a Statute of General Application), which provided that a person who dies intestate and is subject to customary law but has contracted a Christian or statutory marriage would have his or her properties governed by English common law. In the *locus classicus*, *Cole v Cole*, the Supreme Court, in effect, applied Section 41 of the Marriage Ordinance, 1884 without making express reference to it. In reality, the position in Section 41 of the 1884 Marriage Ordinance and *Cole v Cole* is now codified in the Administration of Estates Law of some States in the Nigerian Federation. In addition, a person can also change the customary law which he is ordinarily subject to for another system of customary law for the purpose of succession to his or her properties.

Nigerian courts generally do not assume jurisdiction over property in a foreign country (either in inter-State or international situations) for the purpose of succession and administration of estates. However, Nigerian courts, by way of exception, will assume jurisdiction where some of the properties are situated within its jurisdiction and others are situated outside its jurisdiction.

Some indigenous customary laws in Nigeria violate human rights in relation to the succession of the estate of a deceased person. Constitutional law and human rights have played a positive role in shaping Nigeria's internal conflict of laws rules relating to the succession and administration of estates so that some customs which violate human rights have been declared invalid and of no effect. The constitutional route appears to be more effective than the repugnancy and incompatibility test in protecting the rights of persons under Nigerian law.

PART VI

Foreign Judgments and Arbitration Awards

17

The Common Law Regime for Enforcing Foreign Judgments

I. Introduction

Nigeria has common law and statutory regimes for the enforcement of foreign judgments.[1] However, the enforcement of a foreign judgment in Nigeria is territorially constrained, as such enforcement requires the approval of the Nigerian courts. The Nigerian Supreme Court has held that a foreign judgment can be recognised and enforced under the common law regime.[2] Presently, Nigeria is not a party to any international or regional treaty on the recognition and enforcement of foreign judgments.[3]

This chapter discusses the common law regime for enforcing foreign judgments in Nigeria. The chapter also discusses the concept of a foreign judgment, the nature and theoretical basis of enforcing foreign judgments, jurisdiction to enforce foreign judgments, conditions for enforcing foreign judgments, *res judicata*, defences against applications for the recognition and enforcement of foreign judgments, judgments in foreign currency, and limitation of actions. It is argued in this chapter that several of the issues discussed could provide bases upon which the Nigerian legislature could redraft a truly 'Nigerian' statute on the enforcement of foreign judgments in Nigeria.

II. What is a Foreign Judgment?

A foreign judgment in Nigeria refers only to international judgments and not inter-State judgments within Nigeria. Once a State High Court in Nigeria has rendered a judgment, it can be recognised and enforced in any part of the Federation.[4]

[1] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89. The statutory regime is contained in Reciprocal Enforcement of Judgments Act 1922, Cap 175 LFN, 1958 ('1922 Act'): and Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 ('1960 Act'), Cap F35 LFN 2010.

[2] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89. See also *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 347.

[3] See generally The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019.

[4] *Goodchild v Onwuka* (1961) 1 All NLR 163, 165–66. The Federal High Court is one court in Nigeria (with different judicial divisions), so the issue of enforcing the judgment of the Federal High Court in another Federal High Court is moot.

A party does not need to file a fresh application to recognise and enforce the judgment in another High Court; the appropriate step to take in the inter-State context is to file an application to execute the judgment of a sister State High Court under Sections 104 and 105 of the Sheriffs and Civil Process Act.[5]

One issue that remains undecided is whether judgments from quasi-judicial and administrative institutions of foreign countries fall within the category of a 'foreign judgment'. Equally undecided is whether judgments from regional or international courts such as the Court of Justice of the Economic Community of West African States (ECOWAS) are enforceable as foreign judgments in Nigerian common law.[6] Some courts from other sister African countries such as South Africa,[7] Ghana,[8] and Zimbabwe[9] have been confronted with the issue of whether a national court is bound to recognise and enforce a judgment from an international or regional court, and if so, which legal regime should be used to give effect to such judgments. On the one hand, it could be argued that judgments from international courts fall within the category of foreign judgments because they are not judgments from a Nigerian court. On the other hand, enforcing a judgment from an international court raises intricate issues regarding the relationship between Nigerian law and international law, which may prevent a judgment from a regional or international court from being treated as a 'foreign judgment'. In the event that a Nigerian court is confronted with this issue, the comparative jurisprudence of sister African countries as well as academic writings on the subject would provide useful guidance.[10]

III. Nature and Theoretical basis of Enforcing Foreign Judgments

Nigerian courts are not bound to enforce foreign judgments. At common law, Nigerian courts have traditionally used the doctrine of obligation as the basis upon

[5] Cap S6 LFN 2004. *Goodchild v Onwuka* (1961) 1 All NLR 163, 165–66. *Cf* 'Even in Nigeria, the judgment or order of one State High Court cannot be enforced in another without the registration thereof in the State where it is being sought to be enforced' – *Diamond Bank Ltd v General Securities and Finance Company Ltd* (2008) LPELR-4035 (CA).

[6] See generally M Adigun, 'Enforcing ECOWAS judgments in Nigeria through the Common Law Rule on the Enforcement of Foreign Judgments' (2019) 15 *Journal of Private International Law* 130–61.

[7] *Government of the Republic of Zimbabwe v Louis Karel Fick* (2013) 5 SA 325.

[8] *Republic v High Court (Commercial Division) Accra, Ex Parte Attorney General NML Capital and the Republic of Argentina*, Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013).

[9] *Gramara (Private) Ltd v Government of the Republic of Zimbabwe,* Case No X-ref HC 5483/09 (High Court, Zimbabwe, 2010).

[10] See RF Oppong and LC Niro, 'Enforcing Judgments of National Courts' (2014) *Journal of International Dispute Settlement* 344–71; RF Oppong, 'The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment' (2017) 25 *African Journal of International and Comparative Law* 127.

which a foreign judgment can be enforced.[11] In *Alfred C Toepfer Inc v Edokpolor*,[12] Biramian JSC, speaking for the Supreme Court of Nigeria, stated the traditional common law position:

> At common law, a person who obtained a judgment in a foreign court could bring an action … upon the judgment. According to *Cheshire's Private International Law*, 6th ed., 628–9, the hospitality was thought at first to be due to the comity of nations, but this view was given up by the middle of the 19th century, for logically it involved two inconvenient consequences – (1) that of requiring reciprocal treatment in the foreign court, and (2) that of restricting the ambit of the defence which could be made to a claim based on a foreign judgment. That view was supplanted by another, namely the doctrine of obligation; in the words of Blackburn, J. in *Schibsy v Westernholz* (1), (L.R. 6 Q.B at 159; [1861–73] All E.R. Rep. at 991), the true principle is that –
>
> > '… the judgment of a court of competent jurisdiction over the defendant, imposes a duty or obligation on him to pay the sum for which the judgment is given, which the courts in this country are bound to enforce …'
>
> And further on in his judgment, Blackburn J. makes it plain that the doctrine of 'comity' is incorrect. Thus, no question of reciprocity could arise in an action brought upon a foreign judgment.[13]

Nigerian judges have also proposed jurisdictional reciprocity[14] and the facilitation of international trade and commerce[15] as bases for enforcing foreign judgments.

The basis upon which a foreign judgment is enforced is of practical significance. A foreign judgment enforcement regime founded on comity or the need to facilitate international trade and commerce is more amenable to enforcing a foreign judgment than one founded on reciprocity. This is evident when one compares the common law and statutory regimes in Nigeria. The statutory regime is based on reciprocity and only judgments from a few designated Commonwealth countries fall within the scope of the existing statutes.[16] It is submitted that regardless of the basis on which foreign judgments are enforced, Nigerian courts should counter-balance the aim of ensuring that the rights and interests of the judgment-debtor are protected, with the aim of ensuring that rights created by foreign courts in favour of a judgment creditor should not be easily defeated.

[11] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 91–92; *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* (1983) 1 FNLR 530, 533.

[12] (1965) NCLR 89.

[13] (1965) NCLR 89, 91–92.

[14] The concept of jurisdictional reciprocity is somewhat ambiguous. It could either mean: (i) the Nigerian court would enforce the judgment of a foreign court if it exercises jurisdiction in the manner the Nigerian court does (also referred to as 'jurisdictional equivalence'), or (ii) the Nigerian court would enforce a foreign judgment because the foreign court has been recognised by a designated authority in Nigeria or otherwise proven to be a court that also recognises and enforces Nigerian judgments.

[15] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 338–39 (Oguntade JSC).

[16] The 1922 Act ss 3 and 5.

A foreign judgment is classified as a debt.[17] A person who obtains a judgment in a foreign court could bring an action in Nigeria to enforce that judgment, since it is regarded as creating an obligation between the parties that could be enforced as a simple contract debt.[18] The most expedient way to enforce a foreign judgment in common law is to bring summary judgment proceedings (based on the foreign judgment) on the basis that the defendant has no reasonable prospects of defending the claim.[19]

It has been held by the Nigerian Court of Appeal that a judgment of a Ghanaian High Court can be used as documentary evidence to prove the debt of a person.[20] Adejumo-Obaseki JCA, in delivering the leading judgment for the Court of Appeal (which other Justices unanimously agreed with), rightly held that:

> Clearly, since the 2004 Act is inoperative for reasons earlier given, a judgment creditor who does not desire to register a foreign judgment or who is caught up with the provision as to time for registering such foreign judgment, may choose to bring an action on the foreign judgment, with the judgment serving as documentary evidence of the fact that the judgment debtor is indebted to him in the sum covered by the judgment.[21]

The characterisation of a foreign judgment as a debt has a constraining effect on the type of judgments that are enforceable. It also has implications for the limitation period within which an action may be brought to enforce the judgment. Characterising a foreign judgment as debt excludes foreign non-money judgments such as injunctions, *Anton Piller* orders, or any judgment compelling a person to transfer assets to another person. It is also submitted that the characterisation of a foreign judgment as a debt is an inappropriate legal fiction, and Nigerian courts should characterise a foreign judgment as what it is – a judgment.

IV. Jurisdiction to Enforce Foreign Judgments

As with all claims involving a foreign element, a Nigerian court must have the jurisdiction to hear an action to enforce a foreign judgment. A controversial issue is whether, in an action to enforce a foreign judgment, the jurisdiction of the Nigerian court to hear the application is affected by the original cause of action upon which the foreign judgment was founded. For example, can a

[17] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 91–92; *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* (1983) 1 FNLR 530, 533–34; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 347.

[18] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 91–92; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 346–48.

[19] See for example Orders 11 and 35 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018; and Order 13 of the High Court of Lagos (Civil Procedure) Rules 2019. See also *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[20] *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[21] *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 347.

State High Court (which has no jurisdiction in respect of Admiralty claims) enforce a foreign judgment relating to an Admiralty claim?[22] This question has given rise to conflicting judicial opinions among Nigerian judges. In *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* ('*Wide Seas Shipping*'),[23] the petitioner, as judgment creditor, applied under the Foreign Judgments (Reciprocal Enforcement) Act 1960 (the '1960 Act') to register the judgment obtained in England against the respondent.[24] The respondent objected to the jurisdiction of the High Court of Lagos State to hear the application on the ground that the suit in which the judgment was delivered was an Admiralty matter, and therefore, as a matter of Nigerian law, the Federal High Court was the proper court to hear the application.[25] The High Court of Lagos State rejected this argument by holding that a foreign judgment is treated as an ordinary debt and the 1960 Act gave the Court jurisdiction to register such a judgment.[26] The original cause of action, which was an Admiralty matter, did not preclude the Court from exercising its jurisdiction to register the foreign judgment which was a debt.

A contrary decision was reached in *Access Bank Plc v Akingbola* ('*Akingbola*').[27] In *Akingbola*, the judgment debtor challenged the jurisdiction of the Lagos State High Court to register the judgment of the English High Court. The principal basis of the objection was that the original cause of action in the English court related to breach of the judgment debtor's duty in the unlawful purchase of shares as the director of a company – a matter relating to the Companies and Allied Matters Act, which was within the exclusive jurisdiction of the Federal High Court.[28] The Lagos Court upheld the objection of the judgment creditor by holding that only the Federal High Court could entertain claims relating to the enforcement of the said English judgment under the 1922 Act and register it as a judgment of its own court, which it would have had exclusive jurisdiction to entertain if the original cause of action had been brought before the Federal High Court.

The conflicting decisions in *Wide Seas Shipping* and *Akingbola* are from the Lagos State High Court in Nigeria. A Court of Appeal decision that nearly resolved this problem is *Conoil Plc v Vitol SA* ('*Conoil*').[29] In *Conoil*, the judgment creditor-respondent applied to register a foreign judgment against the judgment debtor-appellant. The original cause of action was instituted in England

[22] Constitution of Nigeria 1999 s 251(1)(g).
[23] (1983) 1 FNLR 530.
[24] This approach to registering the judgment under the 1960 Act was incorrect. See *Macaulay v Raiffeissen Zentral Bank Osterreich AG (RZB of Austria)* (2003) 18 NWLR 282.
[25] See also the Admiralty Jurisdiction Decree 1991 ss 1 and 19.
[26] The registration of the judgment under the 1960 Act was, however, done *per incuriam*. See *Macaulay v Raiffeissen Zentral Bank Osterreich AG (RZB of Austria)* (2003) 18 NWLR 282. Some of the cases referred to in this chapter such as *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108 (*Teleglobe I*); *Teleglobe America Inc v 21st Century Technologies Ltd* (2013) 3 NWLR 99 (*Teleglobe II*) also fell into that error.
[27] Suit No M/563/2013, delivered on 18 February 2014 (Unreported).
[28] Constitution of Nigeria 1999 s 251(e).
[29] (2012) 2 NWLR 50.

for damages against the judgment debtor-appellant in relation to the appellant's refusal to take delivery of a supply of an agreed quantity of automotive gas oil at a designated place offshore in Cotonou. One of the grounds of objection raised by the judgment debtor-appellant to the registration of the English judgment under the 1922 Act was that the original cause of action in England was an Admiralty matter, which was exclusively reserved for the Federal High Court. The Court of Appeal, in dismissing the appeal, simply held that the transaction between the parties was a contract for the supply or sale of gas oil. The fact that the delivery would be transported by ship did not give the transaction between the judgment debtor-appellant and judgment creditor-respondent the character of an Admiralty matter.[30] On further appeal to the Supreme Court, the Court of Appeal's decision was confirmed.[31] Accordingly, the judgment did not address whether the jurisdiction of the Nigerian court to register a foreign judgment is affected by the original cause of action.

Both *Wide Seas Shipping* and *Akingbola* present arguments that are quite formidable, and it is not easy to provide a clear solution to this problem. On the one hand, the decision in *Wide Seas Shipping* could be justified on the basis that, in an action to enforce a foreign judgment, a Nigerian court is neither concerned with a review of the merits of the original cause of action nor does it sit as an appellate court regarding the foreign judgment. Rather, it is simply concerned with the recognition and enforcement of a foreign judgment.[32] A counter-argument to this (in support of *Akingbola*) is that a Nigerian court should only recognise and enforce a foreign judgment if it has jurisdiction to entertain the matter (as the original cause of action) in the first place. This is because once the court decides to enforce the foreign judgment the foreign judgment becomes a judgment of the Nigerian court.[33] Given that Nigerian law treats a foreign judgment as a debt, this implies that a foreign judgment merges the original cause of action. If this is accepted, then it could be argued that an action to enforce a foreign judgment is an independent claim for a debt, such that the underlying action is irrelevant at that stage. This would be consistent with the decision in *Wide Seas Shipping*. Another argument in support of this position is that generally, in an action to enforce a foreign judgment, courts should be wary of procedural manoeuvres that mainly are aimed at preventing or delaying the enforcement of the judgment.

A person who seeks to enforce a foreign judgment in Nigeria must satisfy Nigeria's procedural rules on jurisdiction in international matters, namely

[30] *Conoil Plc v Vitol SA* (2012) 2 NWLR 50.

[31] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463. See also *Kabo Air Ltd v The O' Corporation Ltd* (2014) LPELR-23616 (CA).

[32] See generally *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1; *Teleglobe America Inc v 21st Century Technology Ltd* (2008) 17 NWLR 108; *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606; *Mudasiru v Abdullahi* (2009) 17 NWLR 547; *Conoil Plc v Vitol SA* (2012) 2 NWLR 80.

[33] See generally *Goodchild v Onwuka* (1961) 1 All NLR 163; *Shona-Jason Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 28–29.

residence, presence, and submission. Service of a writ outside of the jurisdiction is also permissible in an action to enforce a foreign judgment.[34]

V. Conditions for Enforcing a Foreign Judgment

A judgment creditor's ability to establish the jurisdiction of the enforcing court for the purpose of enforcing a foreign judgment is not enough to enable it to enforce the judgment in Nigeria. In addition, a judgment creditor must establish proof that the foreign judgment was internationally competent, that the judgment is for a fixed sum of money, and that it is final and conclusive.

A. Proof of Foreign Judgment

In Nigeria, a foreign judgment is not recognised and enforced as a matter of course. Nigerian procedural rules require that a judgment creditor prove the existence of the foreign judgment,[35] a matter for the *lex fori*. Section 113(i) of the Evidence Act 2011 provides alternative ways of proving the existence of a [foreign] judgment, order, other judicial proceedings and legal documents filed in a court outside Nigeria as a public document in the following ways. First is by a copy sealed with the seal of a foreign, or other, court to which the original document belongs. The second, where there is no seal, is that it should be signed by the judge (or any of the judges where there is more than one judge who rendered the judgment) of the said court, who must also attach to his/her signature a statement, in writing, that the court in question has no seal. And finally, by a copy which purports to be certified in any manner which is certified by any representative of Nigeria to be the manner commonly in use in that country for the certification of copies of judicial records.[36]

It is submitted that Section 113(i) of the Evidence Act, 2011 is wide enough to encompass arbitral awards that have been recognised or registered in a foreign court. This point is important because it is open to question whether it is legitimate to make reference to Section 113(j) of the Evidence Act, 2011, which deals with *public documents of any other class* outside Nigeria,[37] and apply it in relation to a

[34] See generally the Supreme Court's decision in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11.

[35] See generally *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* (1983) 1 FNLR 530; *MV 'Delos' v Ocean Steamship (Nig) Ltd* (2004) 17 NWLR 88.

[36] Evidence Act Cap E14 2004 s 113(i), and Evidence Act 2011 s 106(h).

[37] Section 113(j) provides that public documents of any other class in foreign countries shall be proved by the original, or by a certified copy from the legal keeper thereof with a certificate under the seal of notary public, or by a consul or diplomatic agent that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

registered judgment of an arbitral tribunal in a foreign court as the Nigerian Court of Appeal did in *MV 'Delos' v Ocean Steamship (Nig) Ltd* ('*MV Delos*').[38]

In the case of *Wide Seas Shipping*,[39] the State High Court, in applying Section 112(l)[40] (which is *in pari materia* with Section 106(h) of the Evidence Act, 2011), held that it was satisfied by evidence of the official seal of the English High Court and could register the foreign judgment. Section 113(i) of the Evidence Act (also *in pari materia* with Section 106(h) of the Evidence Act, 2011) was at issue in *MV 'Delos'*.[41] In *MV 'Delos'*, the plaintiff-respondent, in the Federal High Court, Lagos claimed against the defendant-appellants the sum of US$12,505,250 as special and general damages for the defendant-appellants' withdrawal of the vessel (the MV 'Delos') from the services of the plaintiff-respondent, which was alleged to be in breach of the charter-party the parties entered into. The defendant-appellants entered a conditional appearance and, without filing a defence, requested the Federal High Court to dismiss the suit on the basis that the action of the plaintiff-respondent was barred by *res judicata* or issue estoppel. The Federal High Court dismissed the claim of the defendant-appellants as unmeritorious, upon which the defendant-appellants appealed. The defendant-appellants argued that, prior to the suit at the Federal High Court, Lagos, the defendant-appellants also had a parallel claim against them pending at the New York arbitral tribunal, where the plaintiff-respondent had made a similar claim, but the claim was dismissed and the award to that effect had been registered at the United States District Court, New York. The plaintiff-respondents vigorously challenged the admissibility of the registered arbitral award for not complying with Section 113(i) and (j) of the Evidence Act. The Court of Appeal, *inter alia*, sustained the decision of the Federal High Court on the basis that the documentary evidence provided by the defendant-appellants neither had the seal of the New York court pursuant to Section 113(i); nor was the document certified by the legal keeper, of the finding of the arbitration panel with a certificate of a notary public or of a US Consul or diplomatic agent stating that the copy is duly certified by the officer having legal custody of the original document, pursuant to Section 113(j).[42]

The judgment reached by the Court of Appeal was grounded on legal technicalities. The first technical point was that the defendant-appellants had closed their submissions by admitting (since it was not denied in the defendant-appellants'

[38] *MV 'Delos' v Ocean Steamship (Nig) Ltd* (2004) 17 NWLR 88, 108–9 (Chukeuma-Eneh JCA as he then was).

[39] (1983) 1 FNLR 530.

[40] Then Evidence Law of Lagos, 1955.

[41] (2004) 17 NWLR 88.

[42] The approach of applying s 113(j) of the Evidence Act is open to question because s 113(i) is sufficient to cover matters of proof of public documents in relation to the recognition and enforcement of foreign judgments. Section 113(j) refers to public documents of any other class elsewhere than in Nigeria and excludes reference to foreign judgments.

counter affidavit) the plaintiff-respondent's affidavit on the admissibility of the registered New York arbitral award, and would not be allowed to do so by way of a further affidavit.[43] The second technical point was that in the alternative (if the defendant-appellants' claim was to be considered), the Court of Appeal had significant doubts as to whether the documents before the Court complied with certification requirements as stipulated under the Evidence Act.[44]

B. International Competence

A foreign court has to be internationally competent before its judgment can be enforced in Nigeria. The foreign court's international competence is assessed from the perspective of Nigeria's private international law rules. Residence, presence, and submission are accepted bases for jurisdiction that satisfy the requirement of international competence for the purpose of recognising and enforcing a foreign judgment.

It is open to question whether the existing recognised bases of international competence – residence, presence, and submission – are adequate for the current international climate of increased trade, movement of persons, and transnational relationships. From a comparative perspective, Canadian courts have applied the real and substantial connection test.[45] This basis requires that a significant connection exist between the cause of action and the foreign court. Such a connection could include the fact that the cause of action arose in the jurisdiction of the foreign court, or that jurisdiction was the place in which the contractual obligation was to be performed. The 'real and substantial connection' test has not found favour outside Canada,[46] and the test has been the subject of academic criticism.[47]

One way to broaden the bases for international competence in Nigeria is to adopt a test of jurisdictional equivalence. This would allow for the enforcement of a foreign judgment if the foreign court assumed jurisdiction on a basis similar to that which a Nigerian court would have done given the same facts.

[43] *MV 'Delos' v Ocean Steamship (Nig) Ltd* (2004) 17 NWLR 88, 108–9.

[44] ibid, 107–8.

[45] *Morguard Investment Ltd v De Savoye* (1990) 3 SCR 1077; *Beals v Saldanha* (2003) 3 SCR 416; *Club Resorts Ltd v Van Breda* (2012) SCC 17. See generally J Blom and E Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) *University of British Columbia Law Review* 373; D Kenny, '*Re Flightlease:* The "Real and Substantial Connection" Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland' (2014) *International and Comparative Law Quarterly* 197–212.

[46] *Re Flightlease* [2012] IESC 12; *Rubin v Eurofinance* [2012] UKSC 46 at [109]–[113].

[47] A Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 *Law Quarterly Review* 87.

C. Fixed-Sum Judgments

Under Nigeria's statutory regime for enforcing foreign judgments, a judgment must be for a fixed sum of money before it is enforced.[48] This is a reflection of the common law because the statutory regime substantially codifies the common law.

The principle that a foreign judgment must be for a fixed sum of money takes a narrow view of the type of remedies that foreign courts provide. A number of countries have reformed this principle through legislation[49] or case law.[50] It is recommended that the future reforms of the common law regime, either by the Nigerian judiciary or legislature, should take these developments into account. Nigerian courts should be free to enforce a wider range of foreign judgments, such as an order for specific performance, injunctions and account.

D. Finality of Foreign Judgments

Nigerian courts only enforce foreign judgments that are final and conclusive.[51] This makes practical sense, as the efficient use of judicial resources would be undermined if a foreign judgment enforced in one state were subsequently reopened, and perhaps, even overturned, in the courts of the country where it was given. Enforcing only final and conclusive judgments ensures that judicial resources are not wasted on judgments that may be subsequently varied or modified abroad.

In Nigeria, a final judgment is one which 'cannot be varied, reopened or set aside by the court which delivered it or any court of co-ordinate jurisdiction although it may be subject to appeal but does not include default judgment.'[52] It appears that what constitutes a 'final judgment' is to be determined according to the law of the Nigerian forum.[53]

A default judgment could be a final judgment. In *21st Century Technologies Ltd v Teleglobe America Inc*,[54] the judgment debtor, *inter alia*, sought to challenge the enforcement of a foreign judgment of the Circuit Court of Fairfax County, Virginia under the 1960 Act, on the basis that the judgment of the foreign court in question was a default judgment. The judgment creditor, on the other hand, argued that there was a default judgment and then a final judgment of the foreign

[48] The 1922 Act s 2.

[49] See New Zealand – Reciprocal Enforcement of Judgments Act 1934 s 3B; Australia – Foreign Judgments Act 1991 s 5(6).

[50] *Pro Swing Inc v Elta Golf Inc* (2007) 273 DLR (4th) 663 at [31], [88]–[99]. See generally RF Oppong, 'Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond' (2005) 39 *University of British Columbia Law Review*, 257; RF Oppong, 'Canadian Courts Enforce Foreign Non-Money Judgments' (2007) 70 *Modern Law Review* 670.

[51] *21st Century Technologies Ltd v Teleglobe America Inc* (2013) 3 NWLR 99.

[52] ibid, 119 (Okoro JCA), quoting Lord Diplock in *The Sennar (No 2)* [1985] 1 WLR 490, 494.

[53] ibid. No specific pronouncement was made regarding this, but it can be inferred from the Court of Appeal's decision that relied on Nigerian law in determining what 'final judgment' is.

[54] (2013) 3 NWLR 99.

court, upon which latter judgment it relied. The Court of Appeal, in resolving this controversy, held that the default judgment was entered in relation to processes filed to determine the issue of damages, and no judgment was entered on the issue of damages in the default judgment. The judgment delivered about 10 months after the default judgment was the final and conclusive judgment of the foreign court, as it determined the issue of damages between the parties and could be registered in the Nigerian court.

VI. Conclusiveness and *Res Judicata* Effect of Foreign Judgments

The general rule in Nigeria is that where a foreign court of competent jurisdiction has settled a dispute or issue between the parties, neither party can re-litigate that matter in a subsequent proceeding.[55] This procedural rule also applies in the inter-State litigation context. In *Fadiora v Gbadebo*,[56] Idigbe JSC, in a brilliant judgment, extensively distinguished and discussed the two types of estoppel by record or *res judicata* thus:

> Now there are two kinds of *estoppel* by record inter partes or per *rem judicatam*, as it is generally known. The first is usually referred to as a cause of action *estoppel* and it occurs where the cause of action is merged in the judgment, that is transit in *rem judicatam* … Therefore, on this principle of law (or rule of evidence) once it appears that the same cause of action was held to lie (or not to lie) in a final judgment between the same parties, or their privies, who are litigating in the same capacity (and on the same subject matter), there is an end of the matter they are precluded re-litigating the same cause of action.
>
> There is however, a second kind of *estoppel* inter parties and this usually occurs where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue come incidentally in question in any subsequent proceedings between the same parties (or their privies); in these circumstances, 'issue *estoppel*' arises. This is based on the principle that a party is not allowed to (i.e he is precluded from) contending the contrary or opposite of any specific point which having been once distinctly put in issue, has with certainty and solemnity been determined against him …
>
> Issue *estoppel* applies whether the point involved in the earlier decision is one of fact or mixed fact and law. However, for the principle to apply, in any given proceedings, all the pre-conditions to a valid plea of *estoppel* inter parties or per *rem judicatam* must apply, that (1) the same question must be for decision in both proceedings (which means that the question for decision in the current suit must have been decided in the earlier proceedings), (2) the decision relied upon to support the plea of issue *estoppel* must be final (3) the parties must be the same (which means that parties involved in both proceedings must be the same (per se or by their privies).[57]

[55] See also Eko JSC in *Conoil v Vitol SA* (2018) 9 NWLR 463, 504.
[56] (1978) 3 SC 91.
[57] *Ladegba v Durosimi* (1978) 3 SC 91, 102–3.

Also, in *Ladegba v Durosimi*,[58] Eso JSC, at the Supreme Court of Nigeria, stated that:

> [T]he doctrine of *res judicata*, which finds expression in the maxim '*nemo dabet his vexari pro una et eadem causa*', lays emphasis on the 'causa'. It is the cause of action that would have been determined and any suit brought to relitigate such action, which has been determined, would be dismissed. Where, however, what is raised is an issue *estoppel*, then, it is only in regard to that issue that has been raised that the parties to an action shall be bound, and the proper course to take would be one striking out all the paragraphs in the pleadings raising that issue.[59]

It has also been held that although the concept of estoppel or *res judicata* is viewed as a substantive rule of law, it is essentially a rule of evidence.[60] The defence of estoppel, being a rule of evidence, is a shield and not a sword. It must be determined specifically, based on pleaded facts – if it is not raised specifically before the trial court, it cannot successfully be raised on appeal for the first time at the appellate courts in Nigeria.[61] Thus, in *MV 'Delos*', the court dismissed the defendant-appellants' appeal on the basis that they simply entered a defence on protest without specifically pleading facts upon which the court could hold that the plaintiff-respondent was barred from re-litigating the dispute in Nigeria. The Court of Appeal in *MV 'Delos'* emphasised that it was necessary to plead the facts so as to make it inequitable or contrary to public policy for the claimant-respondent to sustain a claim against the defendant-appellant in Nigeria. The Court of Appeal justified this position on two main grounds. First, in 'practical terms the effect where the plea of estoppel *per rem judicatam* is upheld, it more or less serves to oust the jurisdiction of the court'.[62] Second, 'authorities seem to suggest estoppel based upon foreign judgments should be applied with caution because of the uncertainties arising from the differences of procedures in foreign countries'.[63]

Based on the decision in *MV 'Delos*', it is submitted that the later decision of the Court of Appeal in *Teleglobe America Inc v 21st Century Technologies Ltd* ('*Teleglobe I*'),[64] is open to debate. In that case, the judgment debtor-respondent, *inter alia*, challenged the registration of a foreign judgment of the Circuit Court of Fairfax County, Virginia, United States, under the 1960 Act, on the basis that the processes of the court were not served in accordance with the applicable law. The Court of Appeal, in allowing the appeal, held that since the issue of service had been raised and resolved in a US court, the judgment debtor was precluded from raising it on grounds of *res judicata* in a Nigerian court; a better option for

[58] (1978) 3 SC 91.

[59] See also *Ebba v Ogodo* (2000) 10 NWLR (Pt. 675) 387; *21st Century Technologies Ltd v Teleglobe America Inc* (2008) 17 NWLR 108, 131–32.

[60] *21st Century Technologies Ltd v Teleglobe America Inc* (2008) 17 NWLR 108, 133.

[61] *Dedeke v Williams* (1944) 10 WACA 164; *Obaye v Okunwa* (1930) 10 NLR 8; *MV 'Delos' v Ocean Steamship (Nig) Ltd* (2004) 17 NWLR 88, 105.

[62] *MV 'Delos' v Ocean Steamship (Nig) Ltd* (2004) 17 NWLR 88, 106.

[63] ibid, 106.

[64] (2008) 17 NWLR 108.

the judgment debtor-respondent would have been to file an appeal at the appellate foreign court to challenge the issue of service.[65]

Teleglobe I appears to conflict with an earlier decision of the Court of Appeal in *Ramon v Jinadu*,[66] where the Court of Appeal set aside the registration of a judgment by the High Court of Lagos (without making any pronouncement relating to *res judicata*) under the 1922 Act, *inter alia*, on the basis that the judgment debtor had not been served in the manner contemplated by the Rules of Lagos State High Court.

It is submitted that the Court of Appeal's approach in *Teleglobe I* contradicts the principle that in an action to enforce a foreign judgment, the competence of the foreign court must be determined under Nigeria's private international law rules. It is also submitted that the Court of Appeal's approach does not sufficiently protect the judgment debtor. There should be a counter-balance between the avoidance of going into the merits of a case that has been decided in a foreign court, and simply rubber-stamping the judgment of a foreign court. Indeed, a party that seeks to rely on a foreign judgment as *res judicata*, or that purely seeks recognition of the foreign judgment, should not be in a better position than the party that seeks to enforce it: there should be equality of treatment. In essence, a party that raises the plea of *res judicata* or only seeks recognition and a party that wants to enforce a foreign judgment should have the same objective: both want to give effect to the foreign judgment. The effect of recognising a foreign judgment can be as important to the parties as enforcing it.

Certainly, a Nigerian court should not enforce a foreign judgment where the service of the court process clearly violates the principle of fair hearings by the standards of Nigerian law. It would be against public policy to enforce that type of judgment.

VII. Defences against the Recognition and Enforcement of Foreign Judgments

The defendant may raise certain defences to the recognition and enforcement of a foreign judgment. There is no exhaustive list of factors that may be raised as a defence against the recognition and enforcement of foreign judgments under common law. Public policy is usually a ground upon which the recognition and enforcement of a foreign judgment may be denied in Nigeria. Public policy was defined by the Nigerian Court of Appeal in *Dale v Witt & Busch*[67] as 'community sense and common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare and the like'.[68] In other cases, the

[65] *21st Century Technologies Ltd v Teleglobe America Inc* (2008) 17 NWLR 108, 135.
[66] (1986) 5 NWLR 100.
[67] (2001) 33 WRN 62.
[68] *Dale Power Systems Plc v Witt & Busch* (2001) 33 WRN 62.

Court of Appeal has defined public policy as the 'policy of not sanctioning an act which is against public interest in the sense that it is injurious to the public welfare or public good'.[69] A foreign judgment founded on a decision not to give effect to an express Nigerian choice of law and jurisdiction agreement could constitute a violation of public policy, especially in instances where it is considered that the relevant Nigerian law is a mandatory norm, or the transaction has a significant connection with the Nigerian state.

Constitutional norms would also likely be a veritable tool upon which refusal to enforce a foreign judgment may be granted, such as breaching of the rules of natural justice, which violates Section 36 of the 1999 Constitution.

The Nigerian court, when faced with a defence against the recognition and enforcement of a foreign judgment, would have to balance the judgment creditor's right to enjoy the fruit of its judgment and the judgment debtor's right not to be deprived of its legitimate defences against the enforcement of a foreign judgment. In this regard, the Nigerian court would have to balance avoiding going into the merits of the case, with avoiding simply rubber-stamping a foreign judgment.

VIII. Judgments in Foreign Currency

At common law, Nigerian courts can award a foreign judgment in foreign currency. Ordering the enforcement of a foreign judgment in foreign currency is different from executing a judgment in foreign currency. For example, the judgment debtor may wish to discharge its obligation in Naira. Where the judgment debtor seeks to discharge its obligation in Naira, a significant issue arises as to the date to be used in ascertaining the obligation. A number of options exist, including the date the cause of action accrued, the date the foreign judgment was given, and the date of payment or execution. The prevailing approach in Nigerian appellate courts is to use the date of payment or execution. This is an area where more certainty in the law is desirable. Given that currencies fluctuate daily, it is submitted here that Nigerian courts' preference for the date of payment or execution should be applauded, as it ensures that the judgment creditor receives what is due to it under the foreign judgment.

IX. Limitation of Actions

As discussed above, a foreign judgment is a debt in Nigeria. In an action to enforce a foreign judgment at common law, this characterisation becomes significant when

[69] *Total Nigeria Plc v Ajayi* (2004) 3 NWLR (Pt. 860) 270, 294; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 92.

the judgment debtor argues that the foreign judgment is statute-barred. This is a matter for the *lex fori* in Nigeria.[70] It also depends on the State in Nigeria in which the action is instituted, as different States have different limitation periods within which a party must bring a cause of action; some States have longer limitation periods, while others have shorter limitation periods. There is a need for specific legislation that clarifies the position on limitation of actions for the enforcement of foreign judgments at common law, since it is argued here that a foreign judgment should not be classified as a debt.

X. Conclusion

This chapter discussed the common law regime for the recognition of and enforcement of foreign judgments in Nigeria. It is evident from the above discussion that it is still a developing area of Nigerian law, with many issues unaddressed by the Nigerian courts and legislature.

It has been suggested that the bases of international competence (residence, presence, and submission) could be expanded to include the real and substantial connection approach as well as jurisdictional equivalence in order to increase a judgment creditor's enforcement options. However, this should also be accompanied with adequate defences for the judgment debtor.

Nigerian judges and law-makers can claim benefit from the jurisprudence of other countries that have expanded and defined the concept of foreign judgments to include non-money judgments and classify a 'foreign judgment' as including judgments from international and regional courts. The characterisation of a 'foreign judgment' as a debt in Nigeria deserves a re-evaluation, and there is also a need for legislative intervention that specifically clarifies the position on limitation of actions as it relates to the enforcement of a foreign judgment at common law.

When recognising and enforcing foreign judgments, Nigerian courts would have to properly balance, on the one hand, the judgment creditor's interest by not restricting his enforcement options and going into the merits of the case, and, on the other hand, the need not to deprive the judgment debtor of appropriate defences by simply rubber-stamping the decision of a foreign court.

There is a need for a clear statutory provision on the jurisdiction of the State and Federal High Courts to enforce a foreign judgment. It has been suggested here that in furthering the aims of international commerce, it is preferable if the State High Court and Federal High Court exercise concurrent jurisdiction in this area of the law.

[70] See generally *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) NCLR 1; *Macaulay v Raiffeisen Zentral Bank Osterreich AG (RZB of Austria)* (2003) 18 NWLR 282; *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254.

18

The Statutory Regimes for Enforcing Foreign Judgments

I. Introduction

In Nigeria, there exists a statutory framework regarding the registration of foreign judgments.[1] The statutory framework generally offers better protection in comparison to the common law regime. This is because the statutory regime promotes expedited enforcement of foreign judgments. In practice, however, judgment-debtors often challenge the registration of foreign judgments, which usually leads to protracted litigation.

The statutory regime in Nigeria is modelled after the United Kingdom's Administration of Justice Act 1920 ('UK 1920 Act'), and the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('UK 1933 Act').[2] This history is important to understanding the relationship between Nigeria's Reciprocal Enforcement of Judgments Act 1922 ('1922 Ordinance')[3] and the Foreign Judgments (Reciprocal

[1] The literature in this field is diverse. For extensive and instructive academic commentary, see KW Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London, Butterworths, 1984); G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1; HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76; RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 353–96; PN Okoli, 'Recognition and Enforcement of Foreign Judgments in Nigeria: Comparative Analysis of Legal Regimes and Jurisdictions' (2013) 24(11) *International Company and Commercial Law Review* 401; PN Okoli, 'Recognition and Enforcement of Foreign Judgments in Nigeria: Comparative Analyses of Public Policy and Procedural Fairness' (2013) 24(12) *International Company and Commercial Law Review* 437; PN Okoli, 'Subject Matter Jurisdiction: The Recognition and Enforcement of English Judgments in Nigeria and the Need for a Universal Standpoint' (2016) 17 *Yearbook of Private International Law* 507; AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129: AO Yekini, 'Foreign Judgments in Nigerian Courts in the Last Decade: A Dawn of Liberalization' (2017) *Nederlands Internationaal Privaatrecht (Dutch Journal of Private international Law)* 205.

[2] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92 (Bairmian JSC).

[3] The Reciprocal Enforcement of Judgments Act 1922, Cap 175 LFN 1958. It should be noted that although the abbreviation '1922 Ordinance' is used in this work, in Nigerian judgments, the abbreviation '1958 Ordinance' and '1958 Act' is frequently used. The 1922 Ordinance was initially contained in Ordinance No 8 of 1922, which is included in Laws of Nigeria (1948) vol V, Cap 192.

Enforcement) Act 1960 ('1960 Act').[4] It also explains why some Nigerian judges make reference to the UK statutory regime, and its interpretation by English courts in deciding cases.[5]

The Nigerian statutory regime only applies to a 'foreign judgment' in the sense of a judgment that was delivered outside Nigeria; it does not apply to the 'registration' of a judgment emanating from a sister State High Court in Nigeria. Thus, where a judgment has been delivered in one State High Court, it can be executed in another State within Nigeria under Sections 104 and 105 of the Sheriffs and Civil Processes Act (the 'SCPA') without the need for registering the judgment (or seeking its recognition and enforcement).[6]

This chapter discusses the applicable statutory regime in Nigeria for enforcing foreign judgments and some of its shortcomings. The chapter discusses the 1922 Ordinance and the 1960 Act. Although the 1960 Act is not yet fully operational because of the absence of the requisite ministerial order, the 1960 Act is discussed in the event that it is brought into force by an order from the Minister of Justice.

II. Ascertaining the Applicable Statutory Regime

In Nigeria, one of the complex problems relating to the enforcement of foreign judgments is ascertaining the applicable statutory regime. A significant number of Nigerian judges have had to deal with this problem but have provided varied responses. This has made the applicable statutory regime relating to the enforcement of foreign judgments difficult to ascertain and apply in practice. In general, the relationship between the 1922 Ordinance and the 1960 Act remains ambiguous.[7]

Two questions that need to be examined are whether the 1922 Ordinance still applies, and whether the 1960 Act applies together with the 1922 Ordinance to a particular country in the absence of an order from the Minister of Justice. The conclusion reached here is that in the absence of an order from the Minister

[4] The Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960, Cap F35 LFN 2010. The 1960 Act came into force in 1961. See Legal Notice No 56 of 1961. Again, it should be noted that although the abbreviation '1960 Act' is used in this work, in Nigerian judgments, the abbreviation '1990 Act' is frequently used.

[5] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92–95 (Bairmian JSC); *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* (1983) 1 FNLR 530, 533 (Onalaja J, as he then was); *Adwork Ltd v Nigeria Airways Ltd* (2002) 2 NWLR 415 (Oguntade JCA, as he then was); *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 350–51 (Ogbuagu JSC); *Grosvenor Casinos Ltd v Ghassan Halaoui* (2002) 17 NWLR 28, 45 (Akintan JCA, as he then was).

[6] *Goodchild v Onwuka* (1961) 1 All NLR 163. *Cf* 'Even in Nigeria, the judgment or order of one State High Court cannot be enforced in another without the registration thereof in the State where it is being sought to be enforced' – *Diamond Bank Ltd v General Securities and Finance Company Ltd* (2008) LPELR-4035 (CA).

[7] See G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 13; HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76, 83.

of Justice, the 1922 Ordinance solely applies, and it is incorrect to rely on the provisions of the 1960 Act in enforcing foreign judgments.

A. Has the 1922 Ordinance been Repealed?

The first enactment to deal with the registration of foreign judgments in Nigeria was the 1922 Ordinance. As stated above, Nigeria's 1922 Ordinance was modelled after the UK 1920 Act. The 1922 Ordinance was first included in the 1948 Edition of the Laws of Nigeria.[8] The 1922 Ordinance, however, did not come into force under the 1948 Edition of the Laws of Nigeria, as no date was provided for it to take effect.[9] Indeed, in *Murmansk State Steamship Line v Kano Oil Millers Ltd*,[10] the Supreme Court observed that:

> There is no law extant on the reciprocal enforcement of foreign judgments which binds Nigeria … The Reciprocal Enforcement of Foreign Judgments Ordinance which appeared in the 1948 Edition was never brought into force in Nigeria and was indeed omitted from the 1958 Edition of the Laws.[11]

With the enactment of the 1960 Act, it was thought that the 1922 Ordinance had been repealed. Thus, there was confusion, as some Nigerian judges applied the 1922 Ordinance on the basis that it was still the applicable law.[12] Other Nigerian judges applied the 1960 Act on the assumption that it was the current law, and that the 1922 Act was no longer applicable.[13]

This confusion was further compounded due to the fact that the 1922 Ordinance was also omitted from the Revised Edition of the Laws of the Federation of Nigeria 1990.[14]

In *The Mercantile Group (Europe) AG v Victor Aiyela* ('*The Mercantile Group*'),[15] Ayoola JCA (as he then was) explained the position better when he brilliantly observed that:

> In regard to the Reciprocal Enforcement of Judgments Ordinance is [*sic*] Chapter 175 of the 1958 Revised Edition, the Committee noted in the Table that that Act had been

[8] Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap 73 LFN 1948.

[9] At the footnote of the Reciprocal Enforcement of Judgments Ordinance, Cap 175 LFN 1958 it is stated that 'Section 9 of the Foreign Judgments (Reciprocal Enforcement) Ordinance, Chapter 73 of the 1948 Edition, provides that Part I of that Ordinance shall apply to Her Majesty's Dominions outside Nigeria and to judgments obtained in the courts of the said Dominions as it applies to foreign countries and to judgments obtained in the courts of foreign countries, and the Ordinance shall cease to have effect except in relation to those parts of the said Dominions to which it extends at the date of commencement of the said Chapter 73 but no date has yet been fixed for the coming into operation of that Ordinance, which is omitted from this edition.'

[10] (1974) 1 ALR Comm 1.

[11] *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) 1 ALR Comm 1, 2.

[12] See *Ramon v Jinadu* (1985) 5 NWLR (Pt. 39) 100.

[13] See *Wide Seas Shipping Ltd v Wale Sea Foods Ltd* (1983) 1 FNLR 530.

[14] It is also omitted from Laws of the Federation of Nigeria 2004, and Laws of the Federation of Nigeria 2010.

[15] CA/l/348/92 (unreported) delivered on 1 July 1996.

> repealed by Act No 31 of 1960. It is evident from this that it was because the Committee considered Cap 175 of the 1958 Revised Edition as repealed that it was omitted from the 1990 Revised Edition. The problem that has arisen is that Act No 31 of 1960 had repealed the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 73 of the 1958 Revised Edition [*sic*][16]) and not the Reciprocal Enforcement of Judgments Ordinance (Cap 175 of the 1958 Revised Edition).[17]

On the issue of whether the 1922 Ordinance had been repealed, Ayoola JCA, in *The Mercantile Group*, held in the negative when he observed that:

> Where the authenticity of an enactment is concerned, once the enactment is included in the Revised Edition one cannot look further than the Revised Edition. Where there is an erroneous omission in the Revised Edition of the totality of an enactment which to all intents and purposes is still in operation, the court, if the question arises, can, if it must, ascertain the authority of that enactment by the best means available to it. In this instance, the best means available is to refer to the 1958 Revised laws for vouching of the text of the Reciprocal Enforcement of Judgments Ordinance and to amending statutes if any. In my judgment having regard to the circumstance in which that [1922] Ordinance has been omitted from the Revised edition, the purpose which the Revised edition itself was supposed to serve as conclusive evidence of the authenticity of each enactment contained therein and the reference [*sic*] and implied saving of the Ordinance by Cap 152, the conclusion that is reasonable is that the ordinance had not ceased to exist and on that ground alone it is the applicable statute.[18]

Ayoola JCA also observed that Section 9 of the 1960 Act saved the 1922 Ordinance from extinction.[19] The approach of Ayoola JCA in *The Mercantile Group* is correct and simply in consonance with the approach of the Supreme Court of Nigeria, to the effect that the omission of a statute from the Revised Edition by the Law Revision Committee does not necessarily mean the statute has been repealed; a statute can only be repealed through legislation.[20]

Despite the observation of Ayoola JCA (as he then was) in *The Mercantile Group*, the controversy remained as to whether the 1922 Ordinance had been repealed (meaning that some judges thought the 1960 Act was applicable).[21] The first reported case where the Supreme Court addressed this problem is

[16] It appears this was a typographical error. The reference to Cap 73 of the Laws of the Federation of Nigeria and Lagos 1958 is the Fugitive Criminal Surrender (Federation) Ordinance 1916, which has no connection with the enforcement of judgments. The correct reference is Cap 73 of the Laws of the Federation 1948. See also AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129.

[17] *The Mercantile Group (Europe) AG v Victor Aiyela*, CA/l/348/92 (unreported) delivered on 1 July 1996, 10–11.

[18] ibid.

[19] ibid.

[20] *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124; *JFS Investment Ltd v Brawal Line Ltd* (2010) 18 NWLR (Pt. 1225) 495. See also *Macaulay v Raiffeisen Zentral Bank Osterreich (RZB of Austria)* (2003) 18 NWLR (Pt. 852) 282.

[21] See *Hyppolite v Egharevba* (1998) 11 NWLR 598; *Momah v VAB Petroleum Inc (Momah I)* (2000) 4 NWLR 534.

Macaulay v RZB of Austria ('*Macaulay*').[22] In *Macaulay*, the defendant-appellant was a foreigner resident in Nigeria who, along with two other persons resident outside Nigeria, guaranteed a loan from the plaintiff-respondent bank to a company based in Channel Islands (the 'borrowing company'). When the borrowing company defaulted, the plaintiff-respondent sued the defendant-appellant in the High Court of England and obtained judgment against them on 19 December 1995. On 28 August 1997, the plaintiff-respondent, by an *ex parte* petition, applied to the High Court of Lagos for leave to register the judgment. The High Court registered the judgment accordingly. The defendant-appellant, by a petition on notice, applied to set aside the registration of the judgment on the grounds that it was not in accordance with the relevant law. The High Court dismissed the defendant-appellant's case. On further appeal to the Court of Appeal, it was dismissed as well. On appeal to the Supreme Court, the main issue raised was whether the 1922 Ordinance had been repealed, so that the judgment could be registered after a period of 12 months, without leave of the court to that effect. In other words, if the lower courts were correct that the 1960 Act was the applicable law, then the plaintiff-respondent's action was not statute-barred because the 1960 Act allows for registration of the foreign judgment within six years of the foreign judgment.

The Supreme Court allowed the appeal and held that the 1922 Ordinance was the applicable law and had not been repealed by the 1960 Act.[23] The Supreme Court reached the same conclusion as Ayoola JCA (as he then was) in *The Mercantile Group*. Uwaifo JSC, in his concurring judgment, actually relied on the views expressed by Ayoola JCA (as he then was) in *The Mercantile Group*.[24] The Supreme Court, in reaching its conclusion, also construed the relevant provisions of the 1922 Ordinance and the 1960 Act. This point is significant and will be returned to shortly.[25]

Suffice it to state that the Supreme Court relied on the provisions of Section 3 of the 1960 Act to the effect that: the Minister of Justice is empowered to extend the application of Part 1 of the 1960 Act with regard to registration and enforcement of foreign judgments of superior courts to any foreign country, including the United Kingdom, if he or she is satisfied that the judgments of the superior courts in Nigeria will be accorded similar or substantial reciprocity in these foreign

[22] *Macaulay v Raiffeisen Zentral Bank Osterreich AG (RZB of Austria)* (2003) 18 NWLR 282.

[23] 'The Supreme Court and counsel did not, however, appreciate that the two statutes were intended to govern different scenarios, so that the question of one repealing the other ought not to have arisen in the first instance.' See HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76, 82.

[24] See also *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62, 70 (Oguntade JCA as he then was) and *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 27 (Ogbuagu JSC) where the views of Ayoola JCA (as he then was) in *The Mercantile Group* were followed, though Oguntade JCA (as he then was) at the Court of Appeal in *Witt & Busch Ltd* mistakenly relied solely on the 1960 Act.

[25] It is submitted in Section II.B and C of this chapter that the Supreme Court was in error to have relied on s 10(a) of the 1960 Act in the absence of an order of the Minister of Justice making Part 1 of the 1960 Act applicable under s 3 of the 1960 Act.

countries. Once an order was made under Section 3 of the 1960 Act in respect of any part of Her Majesty's Dominions to which the 1922 Ordinance earlier applied, the 1922 Ordinance would cease to apply starting from the date of the order. However, the Supreme Court observed that the Minister of Justice had not exercised that power in respect of any foreign country under the 1960 Act, and therefore the 1922 Ordinance still applied.[26]

The Supreme Court also relied on Section 9(1) of the 1960 Act, which provides that Part 1 of the 1960 Act applies to all Commonwealth countries as it applies to foreign countries, and that the 1922 Ordinance ceases to apply to them, except those to which it was extended before the 1960 Act came into operation. The Supreme Court construed Section 9 of the 1960 Act as a saving provision for the 1922 Ordinance until an order was made by the Minister of Justice.[27]

In addition, the Supreme Court made reference to the provisions of Section 5 of the 1922 Ordinance to the effect that the 1922 Ordinance applies to all judgments of the superior courts obtained in the United Kingdom and its application could be extended to any other territory administered by the United Kingdom or any other foreign country through proclamations made by the Governor-General.[28]

The implication of the *Macaulay* decision was that the 1922 Ordinance was the applicable law in Nigeria, and Nigerian courts which had applied the 1960 Act were actually incorrect. The Supreme Court and Court of Appeal have applied *Macaulay* in other cases to the effect that the 1922 Ordinance is the applicable law and has not been repealed, and the 1960 Act comes into operation only upon an order from the Minister of Justice under Section 3 of the 1960 Act.[29] At the time of writing, no such order of the Minister of Justice has been made despite the observations made by the Justices of the Supreme Court on the absence of the order, and the clamour made by relevant stakeholders for the order to be made.[30]

[26] *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282, 296–97 (Kalgo JSC), 303–4 (Uwaifo JSC).

[27] *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282, 296–97. For a similar approach, see the cases of *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309; *Mudasiru v Abdullahi* (2009) 17 NWLR 547.

[28] *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282, 296–98. The countries to which the 1922 Ordinance were extended (by virtue of Section 5) are Barbados, Bermuda, British Guiana, the Colony of Gambia, Gold Coast Colony, Gibraltar, Grenada, Jamaica, Leeward Islands, Newfoundland, New South Wales and Victoria, St Lucia, St Vincent, Colony and Protectorate of Sierra Leone, Trinidad and Tobago.

[29] *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622; *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1; *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606; *Mudasiru v Abdullahi* (2009) 17 NWLR 547; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50. See also *Mudasiru v Onyearu* (2013) 7 NWLR 419. *Cf* G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 7, where he argues that 'in view of the use of the word "may", which is normally an indication of discretionary power, it is theoretically possible to suggest that the Minister of Justice is not compelled to issue an order at all or that it may be possible to operate the provisions of the [1960] Act in the absence of a ministerial order by providing express proof of reciprocity.'

[30] See also G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1; AA Olawoyin,

B. The Problem of Jointly Applying the 1922 Ordinance and 1960 Act

We argue that the 1922 Ordinance cannot be jointly applied with the 1960 Act.[31] An order of the Minister of Justice is needed to bring the 1960 Act into operation.

The law regarding the applicable statutory regime for enforcing foreign judgments in Nigeria would have been clear if the Supreme Court's decision in *Macaulay* had simply stopped at holding that the 1922 Ordinance was the applicable law, and the 1960 Act was only applicable upon an order from the Minister of Justice designating a particular country or listing countries that should benefit from the 1960 Act. The Supreme Court should simply have applied Section 3 of the 1922 Ordinance to reach the decision that the 12-month limitation period applied to registering a foreign judgment in Nigeria, except where the court, by its discretion, extends the limitation time.

Regrettably, the faulty reasoning of the Supreme Court in *Macaulay* has led to a complicated situation where some Nigerian judges apply the 1922 Ordinance and the 1960 Act together, or even apply the 1960 Act alone despite the absence of an order from the Minister of Justice. It is of practical significance to note this error because, although the 1922 Ordinance and the 1960 Act share some similarities, there are significant differences between them.

The limitation period for registering a foreign judgment under the 1922 Ordinance is 12 months, subject to the court's residual discretion to extend it,[32] while the limitation period for registering a foreign judgment under the 1960 Act is six years, with no provision that allows the court to extend the time at its discretion.[33] The 1922 Ordnance does not have any provision related to enforcing judgments in foreign currency, compared with the 1960 Act which has a provision that does not allow enforcing judgments in foreign currency.[34] A foreign judgment that comes within the 1922 Ordinance may be registered under common law at the option of the judgment-creditor,[35] while the 1960 Act provides that a foreign judgment that comes within its scheme cannot be registered or enforced by any other regime.[36] Other notable differences are that the 1922 Ordinance is not as

'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129.

[31] But see eg *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR 1; *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283, 300 where the Court of Appeal wrongly held that the 1922 Ordinance applies together with the 1960 Act. See also *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622, 641; *Kabo Air Ltd v The O' Corporation Ltd* (2014) LPELR-23616 (CA); *Conoil v Vitol SA* (2018) 9 NWLR 463.

[32] 1922 Ordinance s 3.

[33] 1960 Act s 4(1).

[34] 1960 Act s 4(3).

[35] See also the 1922 Ordinance s 3(4). See *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342 (Adejumo-Obaseki JSC).

[36] 1960 Act s 8. See *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342 (Adejumo-Obaseki JSC).

detailed as the 1960 Act:[37] the 1922 Ordinance *technically* does not have any provisions for setting aside the registration of a foreign judgment in Nigeria,[38] while the 1960 Act has a specific provision dealing with this;[39] the 1922 Ordinance appears to give the court discretion in relation to the registration of a foreign judgment,[40] while the 1960 Act appears to make registration of a foreign judgment compulsory in the absence of grounds for refusal of the registration;[41] in relation to grounds for setting aside the registration of a foreign judgment (or refusal to recognise a foreign judgment), the public policy defence under the 1922 Ordinance is related to the cause of action,[42] while the 1960 Act is related to the enforcement of a foreign judgment.[43]

The above differences are significant for justifying the position that applying both regimes to the registration of a foreign judgment in Nigeria not only creates confusion, but also could lead to unjust and unsound results.

In *Macaulay*, the Supreme Court opened the door to this confusion. As discussed above, the decision of the Supreme Court was that the judgment-creditor in that case could not register its judgment under the 1922 Ordinance because the action was brought after 12 months without any application for leave of the court to extend the time within which the foreign judgment could be validly registered. Thus, the lower courts erred when they applied the six-year limitation period in Section 4 of the 1960 Act.

However, the Supreme Court created confusion by wrongly relying on the provisions of Section 10(a) of the 1960 Act to reach its decision.[44] Section 10(a) of the 1960 Act provides that:

> Notwithstanding any other provision of this Act-
>
> (a) a judgment given before the commencement of an order under section 3 of this Act applying Part 1 of this Act to the foreign country where the judgment was given may be registered within twelve months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria.

[37] The 1922 Ordinance has 5 sections compared with the 1960 Act that has 13 sections. In addition, the issues of registration and setting aside are given detailed treatment under the 1960 Act, when compared with the 1922 Ordinance. See also *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 347 (Mohammed JSC).

[38] It only provides grounds upon which registration may be refused by the court under s 3(2)(a)–(f). The window provided for setting aside is done through s 6 of the 1922 Ordinance, which empowers the Chief Judge of the High Court to make Rules of Court giving effect to the 1922 Ordinance. In this regard, the provisions relating to setting aside is contained in Rule 12 of the Rules of Court, made pursuant to Reciprocal Enforcement of Judgments Act, Cap 175 LFN 1958.

[39] 1960 Act s 6.

[40] 1922 Ordinance s 3.

[41] 1960 Act s 4.

[42] 1922 Ordinance s 3(2)(f).

[43] 1960 Act s 6(1)(v).

[44] For a contrasting opinion see AO Yekini, 'Foreign Judgments in Nigerian Courts in the Last Decade: A Dawn of Liberalization' (2017) *Nederlands Internationaal Privaatrecht (Dutch Journal of Private international Law)* 205.

In applying Section 10(a) of the 1960 Act, Kalgo JSC, in his leading judgment (with whom other Justices of the Supreme Court agreed), held that:

> By this provision, irrespective, regardless or in spite of any other provision in the [1960 Act], any judgment of a foreign country including United Kingdom to which Part 1 of that Act was not extended, can only be registered within 12 months from the date of the judgment or any longer period allowed by the court registering the judgment since the provisions of Part 1 of the said Act had not been extended to it. Section 4 of the 1960 Act which speaks of registering a judgment within 6 years after the date of judgment only applies to the countries where Part 1 of the said Act was extended, that is to say, when the Minister made an order under the 1990 Act; and in this case it was not.[45]

The principal error with the reasoning in the *Macaulay* decision is that the learned Justices of the Supreme Court confused the Minister of Justice *making* an order under Section 3 of the 1960 Act with the *commencement* of an order of the Minister of Justice under Section 10(a) of the 1960 Act[46] in reaching the conclusion that it is the 12-month limitation period that applies to the registration of a foreign judgment.

The Supreme Court perpetuated this error in its reasoning in *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* ('*Marine*').[47] In *Marine*, the plaintiff-respondents obtained judgment against the defendant-appellant in the High Court of England on 25 May 1990. On 16 May 1994, the plaintiff-respondents filed a petition at the High Court of Lagos State for the registration of the judgment against the defendant-appellant. The defendant-appellant opposed the application. The High Court dismissed the plaintiff-respondents' case on the basis that they did not come within the statutory period of 12 months within which they had to register the judgment of the High Court of England. The plaintiff-respondents appealed to the Court of Appeal and relied on Section 4 of the 1960 Act which provides for a six-year limitation period. The plaintiff-respondents were successful. The defendant-appellants further appealed to the Supreme Court. The Supreme Court, in allowing the appeal, followed the reasoning in *Macaulay* by holding that the petition to register the judgment from England was filed outside the 12-month period and could not be registered in Nigeria without leave of the court. The Supreme Court perpetuated the error in *Macaulay* by relying on Section 10(a) of the 1960 Act to reach its conclusion. Interestingly, Mohammed JSC (as he then was) approached the problem on the correct legal premise that Part 1 of the 1960 Act (comprising Sections 3 to 10) 'remains dormant and inactive until life is breathed into them' by an order of the Minister of Justice,[48] so that the Court of Appeal was in error to rely on Section 4

[45] *Macaulay v RZB of Austria* (2003) 18 NWLR (Pt. 852) 282, 298–99. See also *Amuchienwa v Unity Bank Plc* (2012) All FWLR 673, 719–25 (Tur JCA).

[46] The true meaning of Section 10(a) of the 1960 Act will be explained in a subsequent section.

[47] (2006) 4 NWLR 622.

[48] *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622, 643.

of the 1960 Act in holding that the judgment of the English High Court, delivered almost four years before the application for registration, should be registered.[49]

However, the majority of the Supreme Court (led by Mohammed JSC), in their reasoning relating to the application of Section 10(a) of the 1960 Act, perpetuated the error in *Macaulay* by holding that:

> It is not at all in doubt that the case of *Macaulay v R.Z.B of Austria (supra)* is virtually on all fours with the present case. The foreign judgments involved in both cases were judgments of the High Court of Justice in the United Kingdom. Both cases started at the High Court of Justice of Lagos State, through to the Court of Appeal, Lagos Division and ultimately to this court. The decision of this court in *Macaulay v R.Z.B of Austria (supra)* was that in both statutes, namely, the 1958 Ordinance in Section 3(1) and the [1960 Act] in Section 10(a), the period prescribed for registering a foreign judgment in Nigeria is twelve months or such longer period as may be allowed by the registering court on application for extension of the prescribed period. I am not at all in doubt that I am bound by that decision.[50]

The approach of the Supreme Court in *Marine* is contradictory and illogical because on the one hand, the Supreme Court held that the whole of Part 1 of the 1960 Act (including Section 10) was inapplicable in the absence of an order promulgated by the Minister of Justice, and on the other hand, the Supreme Court applied Section 10(a) of the 1960 Act.

It was Tobi JSC who correctly stated the law when he briefly observed, on the contrary, that:

> Section 10 of the Act amplifies the provision of Section 3(1) as the second affects or relates to judgment given *before the commencement* of section 3 of the Act applying Part 1 of the Act to the foreign country where the judgment was given. *It does not appear section 10 applies in this appeal* (emphasis added).[51]

In *Witt & Busch Ltd v Dale Power Systems Plc* ('*Witt*'),[52] the error in reasoning and confusion created by the Supreme Court in *Macaulay* became more evident.[53] In *Witt*, the plaintiff-respondent applied to the High Court to register a judgment of the English High Court. The application was heard and granted by Philips J on 13 October 1997. In granting the application, Philips J gave the defendant-appellant 14 days from the date of her order to apply to set aside the registration of the judgment. The defendant-appellant applied to set aside the registration of the judgment after a period of over eight months. The application was heard by Ade Alabi J, who set aside the registration made by Philips J. The plaintiff-respondent was dissatisfied with this ruling and appealed to the Court of Appeal, which

[49] ibid, 643.
[50] ibid, 645. Onu JSC and Kastina-Alu JSC simply agreed with Mohammed JSC. Tobi JSC and Oguntade JSC reached their decisions without reference to Section 10(a) of the 1960 Act.
[51] ibid, 649.
[52] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1.
[53] See also *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 494–95 (Nweze JSC).

allowed the appeal. On further appeal to the Supreme Court by the defendant-appellant, the Supreme Court dismissed the appeal. There were two issues raised on appeal by the defendant-appellant, which are relevant to this discussion. First, the defendant-appellant argued that it was the 1960 Act that was applicable. Second, the defendant-appellant argued that the registration of the judgment of the English High Court in the Lagos High Court was in foreign currency, which contravened Section 4(3) of the 1960 Act.

On the first issue, the Supreme Court followed its reasoning in *Macaulay* by holding that the 1922 Ordinance was applicable, as it had not been repealed. The Supreme Court perpetuated the error in reasoning in *Macaulay* by relying on Section 10(a) of the 1960 Act. This time, it construed Section 10(a) as an *interim provision* for applying the 12-month period under the 1960 Act *pending* an order from the Minister of Justice.

Mohammed JSC made the following observation:

> the judgment in *Macaulay v R.Z.B of Austria (supra)* did not stop on the application of the 1958 Ordinance alone. The judgment also went ahead to consider the relevant provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152, Laws of the Federation of Nigeria, 1990, particularly section 3(1) and 10(a) thereof and came to the conclusion that the [1960 Act] is also applicable to the registration of foreign judgments obtained from the United Kingdom in Nigeria, pending the coming into force of Part I of the Act upon the extension of its application to the United Kingdom by an Order of the Minister of Justice in exercise of his powers to do so under Section 3 of the Act. Since the judgment in dispute between the parties in the present case was obtained from the United Kingdom, in addition to being registrable under the [1922 Ordinance] which is still applicable in Nigeria, *it is also registrable under the [1960 Act] where section 10(a) provides for interim registration of such judgment pending the coming into force of the Order by the Minister of Justice directing the application of Part I of the Act to the United Kingdom and other countries to be specified in the Order* (emphasis added).[54]

Mohammed JSC, in further muddling the purport of Section 3(1) of the 1922 Ordinance with Section 10(a) of the 1960 Act, made the following observation:

> In any case both the [1922 Ordinance] in Section 3(1) and the [1960 Act] in Section 10(a) have made or contain identical provision for the registration of the foreign judgment in the present case within twelve months after the delivery thereof and taking into consideration that the judgment in question was registered within the prescribed period as prescribed under both applicable statutes, the complaint of the appellant of which of those two statutes is applicable is neither here nor there.
>
> … provided the appellant itself is satisfied that the judgment was registered within the time prescribed under the [1960 Act], it is baffling to see the basis of the complaint of the appellant in this issue in insisting that the judgment ought not to have been registered under the [1922 Ordinance], which is indeed the applicable law as the

[54] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 17.

> registration of the foreign judgment made under section 10(a) of the [1960 Act] are only interim provisions.[55]

In relation to the second issue on registering a judgment in foreign currency, Mohammed JSC (with whom the learned Justices of the Supreme Court agreed) held as follows:

> The respondent being fully aware that the provisions of Part I of the Act have not been brought into operation by an order of the Minister of Justice, did not bring its application for the registration of the foreign Judgment in its favour under section 4 of the Act. The appellant therefore cannot hide under the section to attack the registration of the respondent's foreign judgment registered in foreign currency. In other words, until the provisions of section 4 of the [1960 Act] comes into force in accordance with section 3 of the same Act, there is no restriction for any superior court in Nigeria to register a foreign judgment in foreign currency. For this reason, the respondent's foreign judgment of the High Court of Justice, Queens Bench Division of England registered by the trial Lagos State High Court in Pounds Sterling, was correctly registered in accordance with the law.[56]

The problem with the logic in *Witt* is that the Supreme Court held that, in the absence of an order of the Minister of Justice under Section 3 of the 1960 Act, the 1960 Act applied through Section 10(a) as an *interim provision* in relation to a judgment registered within a 12-month period, by wrongly comparing or equating it to the 12-month period under Section 3 of the 1922 Ordinance. The Supreme Court, however, reached a contradictory result by holding that the foreign judgment currency provisions under Section 4(3) of the 1960 Act were inapplicable because an order of the Minister of Justice had not made the 1960 Act applicable.

In *Teleglobe America Inc v 21st Century Technologies Ltd* ('*Teleglobe I*'),[57] the Court of Appeal, following the Supreme Court's decision in *Macaulay* and its protégée cases, stretched the interpretation of the law to absurdity by relying on Section 10(a) of the 1960 Act. In *Teleglobe I*, the plaintiff-appellant sought to register a judgment of the Circuit Court of Fairfax County, Virginia, United States, delivered on 2 December 2004. The plaintiff-appellant registered the judgment in the Federal High Court, Lagos on 25 October 2005. The defendant-respondent filed a notice of preliminary objection to the registration and contended that the Federal High Court was devoid of jurisdiction to entertain the suit on the basis that the defendant-respondent had not been served in accordance with Nigerian law, with the originating process of the suit in the Virginia Circuit Court. The trial court sustained the defendant-respondent's argument and dismissed the case. On appeal to the Court of Appeal, the Court of Appeal allowed the appeal by principally holding that since service was valid in accordance with the law of the foreign country, such a matter was barred from being reopened in the Nigerian court on grounds of *res judicata*.

[55] ibid, 17–18.
[56] ibid, 17, 20.
[57] (2008) 17 NWLR 108.

The Court of Appeal relied on Section 10(a) of the 1960 Act and held that the judgment of the Circuit Court could be validly registered in Nigeria insofar as the application to register was brought within 12 months, as was the situation in this case.[58] The Court of Appeal held that both the 1922 Ordinance and the 1960 Act applied through the so-called *interim* provisions of Section 10(a) of the 1960 Act in relation to the registration of foreign judgments in Nigeria. The absurdity of this case was that the Court of Appeal, based on this dubious logic, relied heavily on the provisions of the 1960 Act – some of which would produce radically different results if the 1922 Ordinance was applied.[59] To top it all off, the bigger picture in this case was that the judgment, sought to be registered from the Virginia Circuit Court, was not one that could be registered under the 1922 Ordinance (as the United States is not a designated country under that regime), nor one that could purportedly be registered under the 1960 Act in the absence of an order of the Minister of Justice. The only regime that could apply in this case was the *common law* regime.[60] Counsel for the parties and the Court of Appeal thus missed the main point in this case.[61]

In *Grosvenor Casinos Ltd v Ghassan Halaoui* ('*Grosvenor*'),[62] the plaintiff-appellant obtained judgment in the English High Court and successfully registered it in the High Court of Oyo State. The defendant-respondent successfully appealed. On further appeal, the plaintiff-appellant's case was dismissed principally on the ground that under the 1922 Ordinance, the Nigerian court could not register a judgment where the judgment-debtor refused to submit to the jurisdiction of the foreign court. The majority of the Supreme Court followed its reasoning in *Macaulay* by applying the 1922 Ordinance. Interestingly, in *Grosvenor*, the majority of the Supreme Court got the law and reasoning correct, despite its reference to *Macaulay*, as there was no reference to Section 10(a) of the 1960 Act in this case. The concurring judgment of Mohammed JSC is worth quoting in this regard:

> Taking into consideration that Part I of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation, 1990, comprising sections 3, 4, 5, 6, 7, 8, 9, and *10*, is to come into force only at the instance of the Minister of Justice by

[58] *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 136–39.

[59] One such manifest contradiction was making reference to Section 4 of the 1960 Act, that mandates the judgment-creditor to apply to register a foreign judgment within 6 years, and the 12-month limitation period under Section 3 of the 1922 Ordinance at the same time.

[60] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[61] See also *Catco Corporation Organised v African Reinsurance Corporation* (2010) All FWLR 677 (the registration of a Liberian Civil Law Court judgment considered under Section 10(a) of the 1960 Act); *African Reinsurance Corp v Gilar Cosmetic Store* (2010) All FWLR 1194 (the registration of a Liberian Civil Law Court judgment considered under Section 10(a) of the 1960 Act); *Kabo Air Ltd v The O'Corporation Ltd* (2014) LPELR-23616 (CA) (registration of a decision from the High Court of Gambia); and *Obasi v Mikson Establishment Industries Ltd* (2016) All FWLR 811 (registration of a judgment from Niger under Section 10(a) of the 1960 Act), which was affirmed by the Supreme Court in *Obasi v Mikson Establishment Industries Ltd* (2016) 16 NWLR 335.

[62] (2009) 10 NWLR 309.

> an order issued by him as specified in section 3 of the Act, and in the absence of this order directing the application of Part 1 of the Act to the chosen countries specified in the order, the provisions of the earlier 1958 Reciprocal Enforcement of Judgments Act, Cap. 175, remain applicable to the registration of foreign judgments in Nigeria, particularly judgments of the United Kingdom, one of which is the subject of this appeal. In other words, section 6 of the 1990 Act which was relied upon by the parties at the courts below and interpreted on appeal by the Court of Appeal below in its judgment is yet to come into force in the absence of the Order to bring [it] into force together with the other sections in Part I of the Act by the Hon. Minister of Justice. This situation makes it necessary to fall back to the 1958 Ordinance.[63]

Mohammed JSC's concurring judgment in *Grosvenor* is significant because it is difficult to reconcile with the previous decisions of *Macaulay*, *Marine* and *Witt.* In other words, it is contradictory, on the one hand to hold that it is only the order of the Minister of Justice that can make Part 1 of the 1960 Act (comprising Sections 3 to 10) effective, and on the other hand, to hold that Section 10(a) of the 1960 Act (which is within Part 1 of the 1960 Act) applies in the absence of an order of the Minister of Justice.

Grosvenor provided the opportunity for the Supreme Court to hold that where a foreign judgment cannot be registered under the 1922 Ordinance (as in this case), the common law regime could be utilised as an alternative to enforce a foreign judgment as a debt in Nigeria.[64] Unfortunately, Ogbuagu JSC, in his concurring judgment, erroneously noted that the common law (and the Evidence Act) was not applicable to the enforcement of a foreign judgment.[65]

If there was any celebration that the majority of the Supreme Court got its bearings right in *Grosvenor* by not referencing Section 10(a) of the 1960 Act, it was short-lived, as the Supreme Court returned to a more absurd approach in *VAB Petroleum Inc v Momah* ('*Momah II*').[66] Interestingly, Muhammad JSC presided and also gave the leading judgment in this case. In *Momah II*, the plaintiff-appellant filed a motion on notice in the Lagos State High Court to register a judgment of the English High Court. It was common ground that the judgment of the English High Court sought to be registered was delivered on 6 November 1991. However, it is not clear from the records in the reported case when the motion was filed to register the English judgment. Thus, Muhammad JSC (with other Justices concurring with him) relied on the date upon which the order for registration was delivered, which was on 14 December 1993, in holding that the plaintiff-appellant (or cross-respondent) had exceeded the time limit of 12 months within which the judgment could be registered, and the decision of the trial court, which registered the judgment of the English High Court, was set aside.[67]

[63] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 334–35.

[64] See *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89; *Wilbros West Africa Inc v MCDONNEL Contract Mining Ltd* (2015) All FWLR 310.

[65] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 349. See also *Grosvenor Casinos Ltd v Ghassan Halaoui* (2002) 17 NWLR 28, 45 (Adamu JCA).

[66] (2013) 14 NWLR 284.

[67] ibid, 332–33.

The approach taken in *Momah II* was erroneous in that the Supreme Court completely relied on the provisions of the 1960 Act as the applicable regime to resolve the dispute between the parties, while at the same time making express reference to the aspect of the decision of *Macaulay* which held that that 1960 Act can only come into operation by an order of the Minister of Justice.[68] In justifying the approach to applying Section 10(a) of the 1960 Act, Muhammad JSC made the following judicial statement, which is difficult to comprehend:

> It is to be noted that the provision of this section [that is Section 10(a)] … quoted above in my view has made a very strict proviso, that, notwithstanding *Any Other Provision of this Act*; which is defined by section 1 to mean: 'the Foreign Judgment (Reciprocal Enforcement) Act' of 1961 as contained in Cap 152 Laws of the Federation 1990.[69]

Muhammad JSC wrongly applied Section 10(a) of the 1960 Act instead of Section 3 of the 1922 Ordinance in holding that the action of the plaintiff-appellant (and cross-respondent) was statute-barred. Peter Odili JSC, in her concurring judgment, also wrongly applied Section 13 of the 1960 Act (which has no connection with the issue of limitation periods) in holding that the judgment was registered outside the 12-month limitation period.[70] Aka'ahs JSC, in his concurring judgment, wrongly reasoned that the action would be time-barred under the 12-month limitation period, either under the 1922 Ordinance or the 1960 Act.[71] In other words, Aka'ahs JSC failed to appreciate that the stipulated period for registering a foreign judgment under Section 3 of the 1922 Ordinance is 12 months (with a possibility of extension at the judge's discretion), while under Section 4(1) of the 1960 Act, the stipulated period is six years.

The approach to applying the 1922 Ordinance and the 1960 Act together and the approach of applying the 1960 Act in the absence of an order of the Minister of Justice are illogical and confusing. The door to this confusion was opened in *Macaulay* through an innocuous reference to Section 10(a) of the 1960 Act, which, like Section 3 of the 1922 Ordinate, also contained a 12-month limitation period. It is thus significant to provide the right interpretation of Section 10(a) of the 1960 Act.

C. Section 10(a) of the 1960 Act

It is submitted that Part 1 of the 1960 Act, comprising Sections 3 to 10 (including Section 10(a)), cannot apply to judgments of the superior courts of any foreign country in the absence of an order from the Minister of Justice under Section 3 of the 1960 Act. In reality, the 1960 Act is not effective in the absence of an order

[68] ibid, 329–33.

[69] ibid, 331.

[70] It is not clear if this was a typographical error. Peter-Odili JSC actually made no reference to Section 3 of the 1922 Ordinance, nor a [wrong] reference to Section 10(a) of the 1960 Act.

[71] *VAB Petroleum Inc v Momah (Momah II)* (2013) 14 NWLR 284, 346.

from the Minister of Justice.[72] This interpretation also resonates with other Commonwealth jurisdictions that have their statutory regime for enforcing foreign judgments modelled after the UK 1922 Act and the UK 1933 Act.[73] In addition, it is also illogical to hold, on the one hand, that the limitation period for registering a foreign judgment is 12 months, both under the 1922 Ordinance and the 1960 Act, and on the other hand, that the limitation period is six years under the 1960 Act.

In this regard, it appears that it is only Tobi JSC's short remark on Section 10 of the 1960 Act in *Marine* that correctly reflects the position of the law. However, the true purport of Section 10(a) is discussed in some depth here.

Section 3(1) of the 1960 Act provides that:

> (1) The Minister of Justice if he is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts in Nigeria, may by order direct–
>
> (a) that this Part of this Act shall extend to that foreign country; and
> (b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Part of this Act.

Section 3(2) of the 1960 Act also provides that:

> (2) Any judgment of a superior court of a foreign country to which this Part of this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if–
>
> …
>
> (c) it is given after the coming into operation of the order directing that this Part of this Act shall extend to that foreign country, or if it is a judgment to which section 10 of this Act applies.

In a nutshell, Section 3(1) and (2)(c), when read together, provide that Part 1 of the 1960 Act can only apply to judgments of superior courts of a foreign country *after the order* from the Minister of Justice comes into operation. However, since Section 3(2)(c) makes reference to Section 10 of the 1960 Act, it is important to explain the purport of Section 10(a) (which has been quoted previously) and Section 10(b).

Section 10(a) of the 1960 Act envisages a situation where a judgment has been given by a superior court of a foreign country[74] to which the 1922 Ordinance applies, *before the commencement* of the order of Minister of Justice *that has already*

[72] AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 136–37.

[73] HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76.

[74] '[W]hen both section 10(a) and (b) employ the wording 'foreign country', the true reference is to the UK and Commonwealth countries to which the 1922 Act had been extended.' – G Bamodu,

been made under Section 3 of the 1960 Act. In other words, Section 10(a) cannot apply in the absence of an order from the Minister of Justice. At the risk of prolixity, the purport of Section 10(a) is that where the Minister of Justice has made an order extending the 1960 Act to apply to a foreign country, but a judgment of the said foreign court was given before that order *commences*, the statutory limitation period of 12 months under the 1922 Ordinance still applies. Section 10(b) of the 1960 Act further justifies this interpretation as correct. It provides that:

> any judgment registered under *the Reciprocal Enforcement of Judgments Ordinance* [1922 Ordinance] at the time of the *coming into operation of an order* made under Section 3 of this Act in respect of the foreign country where judgment was given shall be treated as if registered under this Act and compliance with the rules applicable to the *former Act* shall satisfy the requirements of rules made under this Act (emphasis added).

Again, Section 10(a) and (b), when read together, both envisage that an order must have been made by the Minister of Justice extending the 1960 Act to that country. In other words, Section 10(a) and (b) applies where *an order has been made* by the Minister of Justice, but *has not commenced* at the time the judgment of the foreign superior court was delivered, in which case the 12-month limitation period under the 1922 Ordinance applies (Section 10(a) of the 1960 Act); or, the order of the Minister of Justice is yet to *come into operation* at the time a judgment has been registered under the 1922 Ordinance, in which case registration under the 1922 Ordinance would be regarded as valid as if registered under the 1960 Act (Section 10(b) of the 1960 Act).

There are other statutory provisions contained in the 1960 Act which justify the conclusion that in the absence of the order of the Minister of Justice, no provisions of Part 1 of the 1960 Act can apply. They are Section 9(1) and (2), and Section 5(2).

Section 9(1) and (2) provides that:

> (1). This Part of this Act shall apply to any part of the Commonwealth other than Nigeria and to judgments obtained in the courts thereof as it applies to foreign countries and to judgment obtained in the courts of foreign countries, and the Reciprocal Enforcement of Judgments Ordinance [1922 Ordinance] shall cease to have effect except in relation to those parts of Her Majesty's dominions other than Nigeria to which it extended at the date of commencement of this Act.
>
> (2). If an order is made under Section 3 of this Act extending Part 1 of this Act to any part of Her Majesty's dominions to which the Reciprocal Enforcement of Judgments Ordinance [1922 Ordinance] extended as aforesaid, the said Act shall cease to have effect except in relation to that part of Her Majesty's dominions, except as regards *judgments obtained before the coming into operation of the order* and registered in accordance therewith (emphasis added).

The Supreme Court has rightly interpreted Section 9(1) as a saving provision that preserves the life of the 1922 Ordinance with respect to superior courts of

'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 13.

Commonwealth countries, territories which the 1922 Ordinance originally applied to, or Commonwealth countries to which it was extended by an order of the Governor-General through a proclamation. So what Section 9(2) provides, in a nutshell, is that where the Minister of Justice makes an order applying the 1960 Act to superior courts of a foreign country, the 1922 Ordinance ceases to have effect in relation to the superior courts of the said foreign country, but the 1922 Ordinance remains applicable to the said superior court of the foreign country (or countries) where the judgment of the said superior court of the foreign country was *obtained before the coming into operation of the order* of the Minister of Justice.

Section 5(1) provides the criteria or guidelines upon which rules of court can be made for the purpose of giving effect to the 1960 Act. Section 5(2) provides that:

> Rules made for the purposes of this Part of this Act shall be expressed to have, and shall have, effect subject to any such provisions contained in orders made under Section 3 of this Act as are declared by the said orders to be necessary for giving effect to agreements between Her Majesty and foreign countries, and in force in Nigeria at the date of making of the order concerned, or made between Nigeria and foreign countries, as the case may be, in relation to matters with respect to which there is power to make rules of court for the purposes of this Part of this Act.

Section 5(2), in a nutshell, states that rules of court can only be validly made for the purpose of giving any effect to the 1960 Act, subject to an order made by the Minister of Justice. In other words, it would be invalid to make rules of court to give effect to a statute that has not been given life by an order of the Minister of Justice under Section 3 of the 1960 Act.

Thus, it is again submitted that the use of Section 10(a) of the 1960 Act as a window to apply the 12-month limitation period contained in Section 3 of the 1922 Ordinance, creates unnecessary confusion. Also, the use of Section 10(a) as a window to apply any of the provisions of Part 1 of the 1960 Act is illogical. The order of the Minister of Justice must have been made before any of the provisions of Part 1 of the 1960 Act can apply.

D. A Solution to the Problem

The frustration in trying to understand why the Nigerian Supreme Court makes constant reference to Section 10(a) of the 1960 Act led one author to conclude that 'the interpretation adopted by the Supreme Court is a form of pragmatism to counter the inapplicability of the 1960 Act in the absence of an order from the Minister of Justice'.[75] Whether or not this view is correct, it is submitted that, in

[75] G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 2. For a contrasting opinion, see AO Yekini, 'Foreign Judgments in Nigerian Courts in the Last Decade: A Dawn of Liberalization' (2017) *Nederland Internationaal Privaatrecht (Dutch Journal of Private international Law)* 205.

the absence of an order from the Minister of Justice, the common law foreign judgment regime provides a viable alternative to registration, and parties should resort to it.[76] Adejumo-Obaseki JCA, in delivering the leading judgment for the Court of Appeal (which other Justices unanimously agreed with), rightly held that:

> Clearly, since the 2004 Act[77] is inoperative for reasons earlier given, a judgment creditor who does not desire to register a foreign judgment or who is caught up with the provision as to time for registering such foreign judgment, may choose to bring an action on the foreign judgment, with the judgment serving as documentary evidence of the fact that the judgment debtor is indebted to him in the sum covered by the judgment.[78]

In addition, the most expedient way to enforce a foreign judgment in common law is to bring summary judgment proceedings (based on the foreign judgment) on the basis that the defendant has no reasonable prospects of defending the claim.[79]

III. Shortcomings of the Statutory Regime and Suggested Reforms

Section II of this chapter discussed the complex issue of determining the applicable statutory regime on the registration of foreign judgments. The conclusion reached was that the 1922 Ordinance remains applicable in the absence of an order of the Minister of Justice.

It is submitted here that even if the 1960 Act was to become applicable by an order of the Minister of Justice, it does not appear to be a satisfactory statutory regime for registering foreign judgments. We are of the opinion that the statutory regime in Nigeria is deserving of significant reform: a new statutory regime for registering foreign judgments should be drafted.

A. Paying Loyalty to Our Colonial Past[80]

One of the manifest observations about the 1922 Ordinance and the 1960 Act is that they are legislation that reflect Nigeria's colonial ties to the United Kingdom.

[76] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[77] Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 Cap F35 LFN 2010.

[78] *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 347.

[79] See for example Orders 11 and 35 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018; and Order 13 of the High Court of Lagos (Civil Procedure) Rules 2019. See also *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[80] The authors borrow the controversial phrase used by Tobi JCA (as he then was) in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (unreported), which attracted rebuke from the Supreme Court in *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11.

They appear to be outdated (especially the 1922 Ordinance) and inadequate when compared with the current realities of Nigeria.

Of course, there is nothing wrong with borrowing from another legal system.[81] What is principally wrong with both the 1922 Ordinance and the 1960 Act is that the manner in which the legislation is drafted does not reflect the true independent nature of the Nigerian State. The legislation appears more suited to United Kingdom's colonial heritage and its Commonwealth tradition than the advancement of the interests of the Nigerian State.

The 1922 Ordinance provides, in its long title, that it is an 'Ordinance to facilitate the reciprocal enforcement of judgments obtained in Nigeria and *in the United Kingdom and other parts of Her Majesty's Dominions and Territories under Her Majesty's protection* (emphasis added).'[82] Although the 1960 Act does not have the same long title as the 1922 Ordinance, a significant number of the provisions of the 1960 Act support the view that the 1960 Act appears more suited to the needs of the United Kingdom's colonial heritage and its Commonwealth tradition.[83]

Under Section 3 of the 1922 Ordinance, only judgments that have been obtained in the *High Court in England or Ireland* or in the *Court of Session in Scotland* are enforceable under the 1922 Ordinance. In addition, though some other Commonwealth countries were added to the list of countries whose superior courts could benefit from the enforcement regime under Section 5 of the 1922 Ordinance, it is submitted that there are problems with Section 5 of the 1922 Ordinance.

Section 5(1) provides that:

> Where the Governor-General is satisfied upon information received from the Secretary of State that reciprocal provisions have been made by the legislature of any part of Her Majesty's Dominions outside the United Kingdom for enforcement within that part of Her Majesty's Dominions of judgments obtained in a High Court in Nigeria, the Governor-General may, by Proclamation, declare that this Ordinance shall extend to judgments obtained in a Superior Court in that part of Her Majesty's Dominions in like manner as it extends to judgments obtained in a Superior Court in the United Kingdom and on any such Proclamation being made, this Ordinance shall extend accordingly.

The first problem with Section 5(1) is that, at present, there is no such position as 'Governor-General' or 'Secretary of State' in Nigeria. Nor does it make sense, on pragmatic grounds, to interpret 'Governor-General' as 'President of the Federal Republic of Nigeria', and 'Secretary of State' as 'Chief of Staff' or 'Attorney-General'.[84] Second, the use of a proclamation, as existed during colonial times, does not apply in the current Nigerian context. Third, and perhaps more important, is

[81] *Caribbean Trading & Fidelity Corporation v Nigerian National Petroleum Corporation* (2002) 34 WRN 11.

[82] See also Sections 4 and 5 of the 1922 Ordinance.

[83] See e.g. the 1960 Act ss 3, 9.

[84] See also AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 140.

that a significant number of the countries to which, at the time the Governor General extended, by proclamation, the 1922 Ordinance no longer have the same geographical nomenclature or character that existed during the colonial times.[85] This point is one of practical significance because it is open to doubt whether a judgment emanating from such countries could be correctly enforced today under the 1922 Ordinance, except if it were to be done on 'pragmatic grounds'.[86] In other words, for example, do the Gold Coast Colony, Ireland, Colony and Protectorate of Sierra Leone, and the Colony of Gambia exist in this current era? Are these countries to be categorised as the present-day Ghana, Northern Ireland (or Republic of Ireland), Sierra Leone, and Gambia?

Indeed, a useful comparison could be drawn from the Kenyan decision in *Italframe Ltd v Mediterranean Shipping Company*,[87] where the Kenyan Court of Appeal held that a judgment obtained from the High Court in Tanzania could not be registered under the provisions of the Foreign Judgments Enforcement Act (Cap 43 of the Laws of Kenya),[88] on the basis that the legislation in question referred to the High Court of Tanganyika, the prior nomenclature of Tanzania, and it was not competent for a court on this basis to assume a mistake was made in an Act of Parliament and put a sensible meaning to the words of a statute. In other words, it was not for the court to presume or insert in legislation a substantive word naming a new country in a statutory provision: that responsibility is within Parliament's purview.

If the Nigerian courts are to adopt the Kenyan approach, the list of countries whose judgment can be registered under the statutory regime would be much more restricted. More troubling is the fact that a considerable number of African countries are absent from the list of countries that can benefit from the registration of foreign judgments under the statutory regime, so that judgments from such countries would have to be enforced under the common law regime.[89] This raises questions about Nigeria's role in the legal aspects of political and economic integration in Africa. Also troubling is the fact that a significant number of countries, such as Member States of the European Union, the United States of America, China, and South Africa, which are of immense commercial and political importance to Nigeria, are excluded from the list of countries that can benefit from the statutory regime.[90]

[85] See also G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 3 fn 10; AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129.

[86] See also AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 141.

[87] (1986) KLR 54.

[88] Now replaced by the Foreign Judgments (Reciprocal Enforcement) Act 1984, Cap 43 Laws of Kenya 2004.

[89] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 387–89.

[90] See also AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 147–49.

B. Reciprocity as a basis of Enforcing Foreign Judgments

Another colonial concept which Nigeria inherited from the UK 1933 Act, and applied under the 1960 Act, is the principle of reciprocity. Under Section 3 of the 1960 Act, the basis upon which the Minister of Justice can extend the provisions of Part 1 of the 1960 Act to a foreign country is reciprocity. There are significant problems with using reciprocity as a basis to extend the list of foreign countries to which the 1960 Act can apply. The concept of reciprocity is one that was suited to the colonial period it was initiated in. This view is justified by the words of the Lord Chancellor Viscount Sankey, who made the following statements while moving the motion for the second reading of the bill for the 1933 Act, which was aimed at replacing the then UK 1920 Act:

> A continuous stream of communications was received at the Foreign Office from solicitors and merchants in the United Kingdom complaining of the unfairness of the present position under which their foreign creditors were able to enforce against them in the English Courts judgments given against them in foreign Courts while they were unable to enforce English judgments obtained against their foreign debtors in foreign countries.
>
> In March, 1929, a letter was written from the Foreign Office to Lord Hailsham, then Lord Chancellor, in which Sir Austen Chamberlain, after contrasting the great difference between the treatment of foreign judgments in the United Kingdom and of British judgments in foreign countries, expressed the view that the existing position was unsatisfactory and invited his Lordship's attention to the communications received at the Foreign Office. As the result of that Lord Hailsham appointed a small committee to go into the matter and the Committee made a Report dated June, 1929 in which they recommended a system of reciprocity, and endorsed a suggestion made in the letter from the Foreign Office to the Lord Chancellor, that before any Bill was drafted or presented to Parliament to enable conventions to be concluded informal negotiations should take place with one or two foreign countries, in order to ascertain whether it would be possible to proceed along the lines suggested, and consequently, whether legislation of the kind suggested would enable the desired results to be obtained.
>
> I am happy to inform your Lordships that these informal negotiations took place with France, Belgium and Germany, and that those countries would welcome reciprocal arrangements[91]

Another problem with the concept of reciprocity is that it is somewhat vague and ambiguous. Although it is envisaged under the 1960 Act that the use of a multi-lateral treaty or Convention would be one of the ways of making reciprocal arrangements to enforce a foreign judgment, it appears that this is not the only means by which reciprocity can be applied.[92] How does the Minister of Justice

[91] Foreign Judgments (Reciprocal Enforcement) Bill HL Debate 14 February 1933 – Lords Sitting – vol 86 cols 671–75, cited in HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76, 78.

[92] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 387; AA Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory

correctly ascertain which foreign countries' superior courts have been recognising and enforcing judgments emanating from Nigeria without detailed empirical evidence to that effect? In other words, it does not appear safe to solely entrust this wide discretion to the Minister of Justice to decide which country should benefit from the statutory regime under the 1960 Act. Even if the Minister of Justice was to set up a body to carry out empirical studies to this effect, it does not appear that this is an exercise which is commercially effective or worth the investment.

Furthermore, are Nigerian courts bound by the Ministerial order under Section 3 of the Act, or is there any room for querying the issuance of the Ministerial order, where, in the view of the Nigerian court, the ministerial order was extended to a superior court of a foreign country that does not reciprocally enforce judgments emanating from Nigeria?[93]

In *Grosvenor Casinos Ltd v Ghassan Halaoui*,[94] the Supreme Court suggested that the statutory regime in Nigeria on the enforcement of foreign judgments should be amended to take into account considerations of international trade and commerce, comity, and jurisdictional reciprocity (or jurisdictional equivalence).[95] It is also recommended that the concept of reciprocity under the 1960 Act should be repealed and replaced with a criterion that allows for the enforcement of judgments from sister African countries (with a view to promoting economic integration) and major trading partners of Nigeria (with a view to advancing Nigeria's economic goals).

C. Types of Judgment that can be Enforced

The 1922 Ordinance and the 1960 Act both restrict the enforcement of a foreign judgment to money judgments for a fixed sum,[96] an issue that was discussed in Chapter seventeen of this volume on the common law regime for enforcing

Dualism and Disharmony of Laws' (2014) 10 *Journal of Private International Law* 129, 146–47, fn 73. *Cf* G Bamodu, 'The Enforcement of Foreign Money Judgments in Nigeria: A Case of Unnecessary Judicial Pragmatism?' (2012) 12 *Oxford University Commonwealth Law Journal* 1, 15; HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76, 82.

[93] Indeed, in *Hyppolite* v *Egharevba* (1998) 11 NWLR 598, Rowland JCA observed at 615 that 'It was submitted that respondent's counsel expressly sought to rely on Section 3 of the [1960] Act and raised the issue of the need to show that a judgment obtained in Nigeria can get reciprocal treatment in the country of the foreign judgment as a condition for a valid registration thereof in Nigeria.' However, Rowland JCA made no judicial pronouncement on this issue.

[94] (2009) 10 NWLR 309.

[95] The phrase 'jurisdictional reciprocity or equivalence' could sometimes be confusing. It could mean that the judgment of a foreign court would be registered in Nigeria because a Nigerian judgment would be given reciprocal treatment in the foreign court. It could also mean that a foreign judgment could be registered in Nigeria because the foreign court would assume jurisdiction using the same criteria a Nigerian court would use to assume jurisdiction in matters involving a foreign element. The authors have the latter situation in mind.

[96] See the 1922 Ordinance s 3; the 1960 Act s 4.

foreign judgments. In this regard, some other Commonwealth countries have made (or suggested) reforms extending the statutory enforcement of foreign judgments beyond fixed money judgments.[97] Nigeria can borrow from this.

In addition, the 1960 Act does not allow the registration of a foreign judgment for a sum payable in respect of taxes or other charges of a like nature in respect of a fine or other penalty.[98] It appears that the inclusion of this provision in the 1960 Act is based on policy grounds: the Nigerian court should not be used as an instrument to enforce the tax regime or penal provisions of a foreign state.[99]

However, this view is open to question on the ground that the logic for refusing to enforce tax judgments or penal provisions is no different from the basis upon which a foreign judgment is enforced. In other words, both a foreign judgment for a fixed sum of money and one that is a tax or penal judgment, in substance, have extra-territorial effect. Indeed, if Section 3(2)(b) of the 1960 Act is interpreted literally, it means that a foreign judgment for exemplary damages (which is truly punitive in nature)[100] cannot be enforced under the 1960 Act. It is suggested here that the 1960 Act should be amended to include judgments relating to tax and punitive sums, insofar as it emanates from a commercial transaction.

D. Judgments from Superior Courts

The statutory regime under both the 1922 Ordinance and the 1960 Act only applies to judgments from a superior court of a designated foreign country.[101] In addition, it does not apply to foreign judgments given on appeal from a court that is not designated.[102] What this means is that, for example, a judgment from the High Court of England (which is designated) that affirms a judgment of a county court of England (which is not designated) does not qualify for registration under the statutory regime. It can be enforced, however, at common law. On the other hand, a judgment from the High Court of England that is upheld by the Court of Appeal or United Kingdom Supreme Court (formerly the House of Lords) qualifies for registration under the regime.

The rationale for this limitation on the application of the statutory regime is open to question. It discriminates against courts of the same country.[103] The provisions appear to have been borrowed from Section 1(2)(a) of the UK 1933 Act.

[97] See eg New Zealand: Reciprocal Enforcement of Judgments Amendment Act 1992 s 4.

[98] 1960 Act s 3(2)(b).

[99] See also PN Okoli, 'Recognition and Enforcement of Foreign Judgments in Nigeria: Comparative Analysis of Legal Regimes and Jurisdictions' (2013) 24 *International Company and Commercial Law Review* 401, 405–6.

[100] *Cf Eliochin (Nig) Ltd v Mbadiwe* (1986) 1 NWLR (Pt. 14) 47.

[101] 1922 Ordinance s 3(1); 1960 Act s 3(2).

[102] See also *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92.

[103] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 388–9.

There are statutes in some common law countries which allow for the extension of their respective statutory regimes to inferior or subordinate courts in foreign countries.[104] Such an approach overcomes the limitations imposed on the scope of the statutory regime. Indeed, Section 13(3) of Kenya's Foreign Judgment (Reciprocal Enforcement) Act 1984 empowers the Minister of Justice to designate 'subordinate courts' of foreign countries as beneficiaries of the regime.

It is thus recommended here that the current structure of Nigeria's statutory regime, which discriminates between courts of the same country and judicial system, is inappropriate and should be reassessed.

E. Exclusivity

Section 8 of the 1960 Act provides that no proceedings for the recovery of a sum of money payable under a foreign judgment shall be entertained by any court in Nigeria if they are not brought by way of proceedings for the registration of the foreign judgment. In other words, where a foreign country is a reciprocating jurisdiction for the purposes of the 1960 Act, no proceedings other than registered ones shall be brought in Nigeria to recover money payable under a judgment to which the 1960 Act applies.[105]

Nwodo JCA, in *Teleglobe America Inc v 21st Century Technologies Ltd*,[106] interpreted Section 8 of the 1960 Act to the effect that its rationale is obviously:

> to preserve all foreign judgments and avert incidences of our courts going into the merits of a foreign judgment. Therefore, once a foreign judgment is for registration, the learned trial judge must limit himself to the requirements stipulated under Section 4 of the Foreign Judgment (Reciprocal Enforcement) Act [1960 Act].[107]

The above observation is open to question. The main rationale for Section 8 of the 1960 Act is that a judgment-creditor cannot seek to enforce a judgment registrable under the 1960 Act by using the common law regime.[108] In this regard, a Tanzanian court rightly observed, while construing its foreign judgment provisions which are *in pari materia* with the Nigerian provision, that:

> the effect of section 8 of the Ordinance … is merely that where a judgment is capable of registration under the Ordinance the judgment-creditor is barred from instituting any other kind of proceeding for its enforcement, such as an action upon the judgment or a suit on the original cause.[109]

[104] Australia – Foreign Judgments Act 1991 s 5(3); New Zealand – Reciprocal Enforcement of Judgments Act 1934 s 3A.
[105] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92; *Wilbros West Africa Inc v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310, 342 (Adejumo-Obaseki JSC).
[106] (2008) 17 NWLR 108.
[107] *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 143.
[108] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92; *Wilbros West Africa Inc v MCDONNEL Contract Mining Ltd* (2015) All FWLR 310, 342 (Adejumo-Obaseki JSC).
[109] *Willow Investment v Mbomba Ntumba* (1996) TLR 377, 380.

A similar interpretation was also adopted in the Ghanaian case of *Yankson v Mensah* ('*Yankson*').[110] In *Yankson*, the plaintiff registered an English judgment in Ghana, but the registration was subsequently set aside for being statute-barred. The plaintiff then sought to recover the judgment debt by instituting an action on the judgment. It was held that the action must fail. The court reasoned that the only recourse open to the judgment-debtor was to have the judgment registered – in the instant case, this was not an option that was open to him.

It is difficult to appreciate why the 1960 Act is 'forced' on judgment-creditors whose judgments the Act applies to as the only means for enforcing their judgment.[111] This position can occasion injustice. A judgment-creditor might have good reasons for not wanting to use the 1960 Act, even if its judgment falls within its scope. The judgment might contain parts to which the 1960 Act does not apply, and the judgment-creditor might want to consolidate, rather than split, their enforcement. The judgment-creditor might want to apply for summary judgment, which is an equally expeditious means of securing payment of a debt.[112] The judgment-creditor might want to avoid the mandatory foreign currency provision rules under the 1960 Act and explore the possibility of convincing a judge to follow common law and enforce the judgment in foreign currency. The judgment-creditor may also have exceeded the six-year limitation period on applications to register foreign judgments, and therefore, may wish to investigate whether the uncertainties in the common law regime on the issue of limitations and foreign judgments could inure to their advantage. In international commercial litigation, the availability and possibility of exploring options are assets. The exclusivity provisions of the 1960 Act shut the door to these options.[113]

The exclusivity provisions appear to have been borrowed from Section 6 of the UK 1933 Act. A brief account of the history of this provision is apposite. According to Lord Justice Greer, the section represents 'the first time any restriction was placed upon the right of anyone to say that a foreign judgment created a debt which could be enforced in this country.'[114] He suggests that the section was:

> introduced because foreign countries with which we entered into negotiations required that it should be so provided in order to obtain their agreement to a convention with regard to the reciprocal obligation of this country and the foreign country for the enforcement of the judgment.[115]

[110] (1976) 1 GLR 355, 357.

[111] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 354–5.

[112] See for example Orders 11 and 35 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018; and Order 13 of the High Court of Lagos (Civil Procedure) Rules 2019. Admittedly, in practice, such summary judgment proceedings are sometimes challenged by the defendant so that a summary judgment proceeding may eventually lead to protracted litigation.

[113] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 354–55.

[114] *Yukson Consolidated Gold Corp Ltd v Clark* [1938] 2 KB 241, 253–54.

[115] ibid, 253.

From these observations, it can be surmised that the introduction of the section was contingent on the needs of that time.[116] Those demands are not necessarily present today in Nigeria. Indeed, some Canadian provinces allow foreign judgment-creditors the option of registering *or* suing on a foreign judgment.[117] The Nigerian legislature may take this into account in effecting reform.

It has been observed, however, by the Supreme Court of Nigeria that where the foreign judgment is unregistered or cannot be registered under the 1960 Act, it can still be sued upon to the same extent as it might have been before the 1960 Act (such as under the common law regime), regardless of whether there is reciprocal treatment in the country where the judgment was obtained.[118] The implication of this is that the exclusivity provisions do not bar an application to the Nigerian court to recognise a foreign judgment for other purposes, such as using the judgment to support a plea of estoppel *per rem judicatam*, or as evidence of an outstanding debt that can set off a monetary claim by the judgment-debtor.[119]

F. Powers to make a Judgment Unenforceable

One of the remarkable powers possessed by the Minister of Justice under the 1960 Act is the power to render a foreign judgment unenforceable. Section 12 of the 1960 Act provides that:

> (1) If it appears to the Minister of Justice that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the superior courts of Nigeria is substantially less favourable than that accorded by the courts of Nigeria to judgments of the superior courts of that country, the Minister of Justice may by order apply this section to that country.
> (2) Except in so far as the Minister of Justice may by order under this section otherwise direct, no proceedings shall be entertained in any court in Nigeria for the recovery of any sum alleged to be payable under a judgment given in a country to which this section applies.
> (3) The Minister of Justice may by a subsequent order vary or revoke any order previously made under this section.

To date, there has been no recorded instance of this power being exercised. However, the power is enormous and merits careful scrutiny. Indeed, on a strict interpretation of the relevant provisions, the power extends to judgments enforceable at common law. Section 12(2) provides that 'no proceedings' will be

[116] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 355.

[117] Ontario – Reciprocal Enforcement of Judgment Act 1990 s 8; Alberta – Reciprocal Enforcement of Judgment Act 2000 s 7 (this section gives a judgment-creditor the right to bring action 'on the original cause of action'); Saskatchewan – Reciprocal Enforcement of Judgment Act 1996 s 10.

[118] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 92–94.

[119] ibid, 92–94, construing Sections 11 and 12 of the 1960 Act. See also *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 143.

entertained in any court, and accordingly, it can be argued that both the statutory and common law regimes are affected.[120]

It is significant that this power is exercised in the direction of Nigerian courts; it commands and directs them as to which civil actions to entertain. Section 6 of the 1999 Constitution entrusts judicial powers to the Nigerian courts so that the constitutionality of this provision is open to question. The power to enforce judgments is 'judicial power' and, arguably, should not be subject to executive control or direction. Furthermore, the power is very broad; it directly targets a foreign judgment, regardless of the judgment-creditor. It is possible – albeit improbable – for Nigerians who obtain foreign judgments to be affected by the exercise of this power. It can be argued that a judgment-creditor whose judgment is denied enforcement as a result of the exercise of this executive power has had their property rights violated under the Nigerian Constitution. A judgment that orders payment of money is 'property' – a chose in action. International human rights also recognise the right to property. Nigeria should not make a judgment-creditor's property rights contingent on a state of affairs the judgment-creditor has had no hand in creating (the accordance of less favourable treatment of judgments from a foreign country). The approach could be criticised as parochial. It is recommended that this provision be repealed in Nigeria.

G. Jurisdiction to Enforce Foreign Judgments

It is not clear, under the 1922 Ordinance and the 1960 Act, if the jurisdiction of the Federal High Court or the State High Court to enforce a foreign judgment is dependent on the original cause of action from the foreign court. Under the 1922 Ordinance, there is no definition of what 'Court' means.[121] Moreover, there was no separate jurisdiction for the State High Court and Federal High Court at the time the 1922 Ordinance was drafted and came into effect in Nigeria. Under the 1960 Act, though 'superior court in Nigeria' is defined to mean 'the High Court of a State or of the Federal Capital Territory, Abuja or the Federal High Court',[122] it does not specifically state whether the jurisdiction of the State or Federal High Court is dependent on the original cause of action.

This significant question has given rise to conflicting judicial opinions among Nigerian judges. Thus, in *Wide Seas Shipping Ltd v Wale Sea Foods Ltd*,[123] the petitioner, as judgment-creditor, applied under the Foreign Judgments (Reciprocal Enforcement) Act 1960 to register the judgment obtained in England against

[120] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 355.

[121] Section 2 simply defines what 'registering court' means.

[122] 1960 Act s 2(1).

[123] (1983) 1 FNLR 530.

the respondent.[124] The respondent objected to the jurisdiction of the High Court of Lagos State to hear the application, on the ground that the suit in which the judgment was delivered was an Admiralty matter, and the proper court to hear the application under Nigerian law was the Federal High Court.[125] The court rejected this argument by holding that a foreign judgment is treated as an ordinary debt and the 1960 Act gave the court jurisdiction to register such a judgment.[126] The original cause of action, which was an Admiralty matter, did not preclude the court from registering a foreign judgment which was a debt.

However, a contrary decision was reached in the high-profile case of *Access Bank Plc v Akingbola* ('*Akingbola*').[127] In *Akingbola*, the judgment-debtor challenged the jurisdiction of the Lagos State High Court to register the judgment of an English High Court. The principal basis of the objection was that the original cause of action in the English court related to breach of the judgment-debtor's duty in the unlawful purchase of shares as the director of a company – a matter relating to the Companies and Allied Matters Act – a matter within the exclusive jurisdiction of the Federal High Court. The court upheld the objection of the judgment-creditor by holding that only the Federal High Court could entertain claims relating to the enforcement of the said English judgment under the 1922 Ordinance and register it as a judgment of its own, since it would have exclusive jurisdiction to entertain the claim if the original cause of action had been brought before the Federal High Court.

This controversy was raised in *Conoil Plc v Vitol SA*,[128] but the Court of Appeal did not specifically pronounce on it.[129]

It is submitted that pending a legislative provision that clarifies this position, the Federal High Court and the State High Court should assume concurrent jurisdiction to register a foreign judgment, irrespective of the original cause of action from the foreign court.

H. Foreign Currency Judgments

Where the sum payable under a foreign judgment is to be registered in foreign currency, the judgment shall be converted at an equivalent rate to Naira on the

[124] This approach to registering the judgment under the 1960 Act was incorrect. See *Macaulay v Raiffeisen Zentral Bank Osterreich (RZB of Austria)* (2003) 18 NWLR 282.

[125] See also the Admiralty Jurisdiction Decree 1991 ss 1, 19.

[126] The registration of the judgment under the 1960 Act was, however, done *per incuriam*. See *Macaulay v Raiffeisen Zentral Bank Osterreich (RZB of Austria)* (2003) 18 NWLR 282. Some of the cases referred to in this chapter, such as *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108 and *Teleglobe America Inc v 21st Century Technologies Ltd* (2013) 3 NWLR 99, also fell into that error.

[127] Suit No M/563/2013, delivered on 18 February 2014 (Unreported).

[128] (2012) 2 NWLR 50.

[129] Affirmed by the Supreme Court in *Conoil Plc v Vitol Plc* (2018) 9 NWLR 463. See also *Kabo Air Ltd v The O' Corporation Ltd* (2014) LPELR-23616 (CA).

basis of the rate of exchange prevailing at the date of the judgment of the original court.[130] In this regard, the 1960 Act appears to differ from the common law regime for registering foreign currency judgments in Nigeria. First, the common law regime does not mandate conversion of foreign currency to Naira; it is at the discretion of the claimant to make such a request. Second, in cases where conversion is made to Naira, the claimant is entitled to the conversion rate of the foreign currency at the date of execution of the judgment, whereas the statutory regime requires the judgment-creditor to benefit from the conversion rate at the date of the judgment of the original court. In this regard, the 1960 Act does not suit commercial realities and the inherent fluctuation of exchange rates. The approach of the 1960 Act may lead to a situation where the judgment-creditor obtains a foreign currency judgment, but by the time of registration, the Nigerian currency has depreciated so that the judgment-creditor is deprived of its legitimate expectation of enjoying the fruits of its judgment. It is unfortunate that where a judgment-creditor seeks to register a foreign judgment, it is mandated to convert the judgment into Naira. The mandatory currency provisions are anachronistic – they were adopted at a time when courts did not have jurisdiction to give a judgment in foreign currency.[131]

Some common law countries have recognised the potential hardship and injustice that can result from this approach, especially to judgment-creditors. Statutes in Australia and New Zealand give a judgment-creditor the option to state, in its application for registration, whether it wishes the judgment to be registered in the currency of the original judgment.[132] This choice mitigates the potential hardship that can be caused by fluctuations in exchange rates – at least from the judgment-creditor's perspective.[133] It is recommended that in Nigeria, future reforms of the 1960 Act should incorporate a provision similar to that in the New Zealand and Australian statutes. Indeed, given that Nigerian courts can now give judgments in foreign currency, there is no good reason why judgment-creditors cannot register a foreign judgment in the currency in which it was given.

The provisions of Section 4(3) have been considered by the Supreme Court in two reported cases.[134] In one of the cases, the Supreme Court did not make a pronouncement on its application because it was not ripe for application via an order of the Minister of Justice.[135] In an earlier case, the Supreme Court, at an interlocutory stage of a stay of execution of the lower court's judgment, considered

[130] 1960 Act s 4(3).

[131] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 393.

[132] Australia – Foreign Judgments Act 1991 s 6(11)(a); New Zealand – Reciprocal Enforcement of Judgments Act 1934 s 4(3).

[133] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 396–97.

[134] *Momah v VAB Petroleum Inc (Momah I)* (2000) 4 NWLR 534; *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1.

[135] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1.

the provisions of Section 4(3) where the appellant complained that the registration of a foreign judgment was in US dollars and not converted to Naira. The Supreme Court dismissed the appellant's case but avoided going in-depth into the provisions of Section 4(3), as it did not want to delve into the merits of a case at an interlocutory stage.[136]

IV. Registering Foreign Judgments under the 1922 Ordinance

This section discusses the substantive provisions of the 1922 Ordinance in relation to the registration of foreign judgments. Some references are also made to the Reciprocal Enforcement of Judgments Rules (the 'Rules of Court'),[137] made pursuant to Section 6 of the 1922 Ordinance.

A. Registering the Foreign Judgment

Under the Rules of Court, an application for leave to have a judgment registered in Nigeria shall be made by petition *ex parte* or on a motion, with notice, to a judge.[138] If the application is made *ex parte*, the judge to whom the application is made may direct notice to be served on the judgment-debtor.[139] It has been held in this regard that serving notice on the judgment-debtor is not required; it is determined by the judge as a matter of discretion.[140]

Also, any order giving leave to register shall be drawn up by, or on behalf of, the judgment-creditor of a foreign judgment.[141] When the application for the order is made on notice, the order shall be served on the judgment-debtor, but no service of the order on the judgment-debtor is required where the order is made on an

[136] 'It is to be noted that these provisions [Section 4(3)] are concerned with the registration of a foreign judgment, while the issue before us and indeed the before the Court of Appeal in this respect, is of the execution of the foreign judgment. It does not matter that the consequential order made by the Court of Appeal has been in foreign currency since there is no inhibition that a substantive claim could be brought in foreign currency.

It is significant to point out that the exchange rate, as at the date the Court of Appeal made the order for the judgment debt to be deposited, can easily be ascertained from the Central Bank of Nigeria by either party, in the event of any doubt, if it becomes necessary for the judgment debt to be deposited in Naira. It is significant that the consequential order merely refers to "sum of money" and is not specific about the sum being either in dollars or naira.' *Momah v VAB Petroleum Inc (Momah I)* (2000) 4 NWLR 534, 552 (Uwais CJN).

[137] Cap 175 Vol IX LFN 1958.

[138] Rules of Court r 1(1).

[139] Rules of Court r 1(2).

[140] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1; *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283.

[141] Rules of Court r 5.

ex parte application.[142] A judge seised with an application made *ex parte*, however, has the discretion to direct that the judgment-debtor be put on notice.[143]

Under the 1922 Ordinance, the court may register a judgment if, in all circumstances of the case, it thinks it is just and convenient that the judgment be registered in Nigeria.[144] It has been held in this regard that a foreign judgment is not registrable as a matter of course; it is subject to the judge's discretion, which should be exercised in a principled manner.[145] The Nigerian appellate court has also held that discretion to refuse to register a foreign judgment or set aside the registration of a foreign judgment can only be exercised after a consideration of all relevant materials before the court.[146]

In *International Finance Corporation v DSNL Offshore Ltd*,[147] the Federal High Court, Port Harcourt Judicial Division allowed the registration of the judgment of an English Court in the sum of US$19,732,734, awarded in favour of the plaintiff-appellant. The defendant-respondent applied to set aside the registration of the judgment. The trial court held that the court which registered the judgment had done so properly, that other proceedings between the parties at the Federal High Court in Akure judicial division had been brought to the notice of the English Court, the said proceedings were not fraudulent, the claims were different, there was no anti-suit injunction by the Nigerian court against the English proceedings, and that the English suit was not against Nigerian public policy. Nevertheless, the trial court set aside the registration on the ground that it was not just and convenient, based on the pending process in the Federal High Court, Akure Judicial Division, although that was not part of the grounds upon which the defendant-respondent applied for setting aside the judgment. An appeal to the Court of Appeal was unanimously allowed. Galadima JCA made the following statements in reprimanding the trial judge:

> [I]t is difficult for me to rationalize the conclusion of the learned trial Judge that it was not just or convenient to enforce the judgment obtained in the English Court in Nigeria. The approach of the learned trial judge involved a consideration of the pending process alone. That was wrong. He should have and ought to have considered the totality of materials before him … It is difficult to understand why the learned trial Judge who found that the English judgment was properly conducted; that the proceedings of the Federal High Court, Akure were brought to the knowledge of the English Court; that the said proceedings were not fraudulent, and that the claims were different from the Nigerian claims, that there is no anti-suit injunction by the Nigerian courts against the English proceedings, and that the English suit is not against the Nigerian public policy

[142] Rules of Court r 5.

[143] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 35–38 (Garba JCA), 43–44 (Onnoghen JCA as he then was); *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283, 299–300.

[144] 1922 Ordinance s 3.

[145] *Mudasiru v Onyearu* (2013) 7 NWLR 419, 445 (Danjuma JCA). Nigerian judges often use the phrase 'judicially and judiciously' when judicial discretion is talked about.

[146] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606.

[147] (2008) 9 NWLR 606.

> to hold later in the same judgment that it is not just and convenient to enforce it in Nigeria. Viewed calmly, it would appear to me that the whole approach by the learned trial judge to this matter is a contradiction in terms and lacking any legal basis.[148]

Where a judgment is registered under the 1922 Ordinance, the judgment shall, from the date of registration, be of the same force and effect, and proceedings may be taken thereon as if it had been a judgment originally obtained or entered into on the date of registration in the registering court.[149] The implication of this is that once a judgment has been so registered in any High Court in Nigeria, it can be enforced in any part of the Federation: it is not necessary to make a fresh application to register it in another High Court.[150] Thus, it has been held that where the judgment of the UK court has been registered in the Lagos State High Court, it is no longer to be treated as a judgment of the United Kingdom. Rather, such a judgment should be treated as a judgment of the High Court of Lagos so that a subsequent 'registration' of this judgment in the Port Harcourt Judicial Division of the Rivers State High Court[151] was, in reality, made under Sections 104 and 105 of the SCPA rather than the 1922 Ordinance.[152] In other words, once a foreign judgment has been registered under the 1922 Ordinance, it can be enforced in any part of Nigeria.

Another implication of the foregoing is that since the judgment which has been registered in Nigeria is no longer the judgment of the foreign court, the Nigerian court also has the power to set the registration aside.[153]

The registering court shall also have the same control and jurisdiction over the judgment as over similar judgments, insofar as is it relates to execution under the 1922 Ordinance.[154] The implication of this is that upon registration under the 1922 Ordinance, the registering High Court's jurisdiction is only limited to execution.[155] In this regard, it has been held that the Port Harcourt Judicial Division of the Rivers State High Court cannot exercise greater jurisdiction over a foreign judgment already registered in the Lagos State High Court, and since the Port Harcourt Judicial Division was confined to execution of the judgment, it could not order or permit payment by instalments, which had not been ordered by the Lagos State High Court, and an application for such an order was not tenable in the circumstances.[156]

The judgment-creditor is entitled to recover reasonable costs related to the registration of the foreign judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) as if

[148] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606.
[149] 1922 Ordinance s 3(3)(a).
[150] *Goodchild v Onwuka* (1961) 1 All NLR 163.
[151] Then Port Harcourt Division of the Eastern Region High Court.
[152] *Goodchild v Onwuka* (1961) 1 All NLR 163.
[153] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 28–29.
[154] 1922 Ordinance s 3(3)(b).
[155] *Goodchild v Onwuka* (1961) 1 All NLR 163.
[156] ibid.

they were sums payable under the judgment.[157] It has been held by the Court of Appeal in this regard that it was wrong for a trial judge to set aside the registration of a foreign judgment on the ground that this cost was excluded from the scope of what could be awarded to a judgment-creditor.[158]

The judgment-creditor may also be entitled to such reasonable costs of the action where an application to register its judgment under the 1922 Ordinance was previously refused.[159] However, unless the court orders otherwise, a judgment-creditor cannot recover such costs if the action is brought by any other means than registration under the 1922 Ordinance.[160] The implication of this is that while the judgment-creditor can elect to bring an action at common law in respect of a reciprocal enforcement country recognised under the 1922 Ordinance, the court generally would not order for the costs of the action to be paid where the judgment-creditor brings its action under common law or any other means outside the 1922 Ordinance, in respect of such a reciprocal country.

B. Refusal to Register/Setting Aside Registration of the Foreign Judgment

(i) Matters of Procedure

Technically, there is no provision for setting aside the registration of a foreign judgment under the 1922 Ordinance.[161] It actually provides for grounds upon which a registering court shall refuse to register a foreign judgment.[162] It is the Rules of Court, made pursuant to Section 6 of the 1922 Ordinance, that provide the means by which a judgment-debtor may set aside a foreign judgment.[163] The Court of Appeal has held that the preconditions for the registration of a foreign judgment also serve as grounds for setting aside a registered judgment, in the event that the judgment-creditor registered the foreign judgment without objection.[164] However, it has been held by another Court of Appeal that the fact that a foreign judgment ought not to have been registered in the first instance, without more, is not a ground for setting aside a registration because if it were, the judge that registered the judgment would be sitting in judgment over his or her own earlier ruling.[165] It appears the way in which both decisions of the Court of Appeal can be

[157] 1922 Ordinance s 3(3)(c).
[158] *Mudasiru v Abdullahi* (2009) 17 NWLR 547, 567.
[159] 1922 Ordinance s 3(4).
[160] 1922 Ordinance s 3(4).
[161] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 347 (Mohammed JSC).
[162] 1960 Act s 3(2).
[163] See also Rules of Court r 12.
[164] *Mudasiru v Onyearu* (2013) 7 NWLR 419.
[165] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606, 633.

reconciled is that the setting aside of a registered foreign judgment under the 1922 Ordinance is one of principled judicial discretion.[166]

Although in most cases an application to set aside the registration of a foreign judgment is made by the *judgment-debtor*, it has been held that there is no good reason why an *interested party*, who was not a party to the proceedings in the original court but wishes to challenge the registration of a judgment against its interest, should not be joined so that it can be given a fair hearing to present its case in seeking to set aside or challenge the registration of a foreign judgment.[167]

Under the Rules of Court, an order giving leave to register the judgment shall state the time within which the judgment-debtor is to be entitled to apply to set aside the registration.[168] The judgment-debtor may, at any time within the time limited by the order giving leave to register, and after service on him of notice of the registration of the judgment, apply by petition to a judge to set aside the registration.[169]

The Court of Appeal has held that whether the registration of a foreign judgment is made upon an *ex parte* application or a motion on notice, where the judgment-debtor did not make a defence, such a judgment-debtor shall not be barred from bringing an application to have the registration set aside.[170] The decision of the Court of Appeal relating to setting aside a foreign judgment registered via a motion on notice merits consideration, as its approach is open to question. Indeed, in one of the cases in which the Court of Appeal made this decision, there was a powerful dissenting judgment which the authors agree with.[171] In *Shona-Jason (Nig) Ltd v Omega Air Ltd*,[172] the application to register an English judgment was actually brought by motion on notice so that the defendant was served. The judgment-creditor, at the application stage, deposed to an affidavit that the relevant conditions under the 1922 Ordinance had been complied with. The judgment-debtor did not put up any defence against the judgment-creditor, nor did the judgment-debtor challenge the judgment-creditor's affidavit in support of the application registering the foreign judgment. Subsequently, the judgment-debtor applied to the court to set aside the registration of the foreign judgment on the ground that the judgment-debtor) had not been served with the court processes nor did it appear or submit to the court's jurisdiction. The judgment-creditor did not challenge the judgment-debtor's affidavit. The majority of the Court of Appeal held that the judgment-debtor was entitled to apply to set aside

[166] See also *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006)1 NWLR 1.
[167] *Mudasiru v Onyearu* (2013) 7 NWLR 419.
[168] Rules of Court r. 6.
[169] Rules of Court r 12. See also text to nn 177–179 below.
[170] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1; *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283. The provisions which were being construed (Rules 1(1), 1(2), 5, 6 and 12 of the Rules of Court) did not *precisely* provide an answer to the issues before the court, so the Court of Appeal was actively engaged in gap-filling.
[171] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 45–66 (Muhammad JCA).
[172] ibid.

the registration of the foreign judgment, and the judgment-debtor's position was further entrenched by the fact that the judgment-creditor, at the time of application to set aside, did not challenge the affidavit of the judgment-debtor, which alleged that it did not submit to the jurisdiction of the original court.[173]

The minority judgment held, however, that the judgment-debtor, who had been put on notice and had opportunity to challenge the registration of the foreign judgment, including the affidavit in support at the application stage, but failed to do so, should not be allowed to set up new grounds at the setting aside stage to set aside the registration of the foreign judgment.[174] Moreover, the judgment-debtor should not be allowed to blow hot and cold by conceding to the case of the judgment-creditor at the application stage, and subsequently raise new grounds to challenge registration at the setting aside stage.[175] In addition, the minority invoked Section 3(4) of the 1922 Ordinance, which gives the judgment-creditor the right to repeat an application for the registration of a foreign judgment where an earlier one had been refused by the court, and held that

> it will be against public policy if such subsequent applications are made on the basis of the same facts in support of the earlier application, that was refused after the court had considered the application on notice and on its merits.[176]

We submit that the minority judgment is right. It is preferred because it aims at substantial justice rather than technical justice. It is an approach that promotes the aim of swift registration of foreign judgments in the sense that the purpose of putting the judgment-debtor on notice is to give them the opportunity to challenge the registration of the foreign judgment; the judgment-creditor should not be allowed to delay this process by applying on fresh grounds to set aside the registration.

Where the registering court registers a judgment upon an *ex parte* application, it can be set aside by the same registering court.[177] However, a controversial issue is whether the same trial court or a court of coordinate jurisdiction can set aside the registration of a foreign judgment brought on notice, or whether this must be done by way of appeal. The solution to this problem is found in the Rules of Court. Rule 12 provides that the judgment-debtor may, at any time within the time limited by the order giving leave to register, after service on him of the notice of the registration of the judgment, apply by petition to a judge to set aside the registration or to suspend execution of the judgment. The implication of this is that the

[173] ibid, 35–38 (Garba JCA), 43–44 (Onnoghen JCA as he then was). 'It is clear that the majority were greatly influenced by reference to s 6(1) of the 1961 Act which was not applicable, though it is difficult to say if the outcome of the case could have been different if their lordships had known this fact.' HA Olaniyan, 'The Commonwealth Model and Conundrum in the Enforcement of Foreign Judgment Regime in Nigeria' (2013) 40 *Commonwealth Law Bulletin* 76, 87.
[174] *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 64–66 (Muhammad JCA).
[175] ibid, 64–66 (Muhammad JCA).
[176] ibid, 65 (Muhammad JCA).
[177] Rules of Court r 5.

same trial judge or another judge of coordinate jurisdiction can set aside the registration of a foreign judgment that violates the 1922 Ordinance; it does not have to be done for the first time on appeal.[178] This point is significant because some other Nigerian appellate judges have expressed the view that it is for an appellate court to set aside a judgment of a lower court that has registered a foreign judgment, rather than the same trial judge or a court of coordinate jurisdiction.[179] Such views were expressed without consideration of Rule 12 of the Rules of Court. Thus, such views are *per incuriam*, in disregard of governing legislation, and should not be followed.

Where the registration of a Nigerian court is finally approved by the appellate court, however, the judgment-debtor should not be allowed, at the execution stage, to challenge the issue of the registration of the foreign judgment.[180] This position is justified on practical policy reasons and common sense. Indeed, there must be an end to litigation: the principle of *res judicata* should apply in this situation.

It has been held that the only acceptable means to set aside a foreign judgment is a petition or originating process, so that where a judgment-debtor filed an interlocutory motion on notice to set aside the registration of an English judgment, despite the challenge of this approach by the judgment-creditor, the Court of Appeal has held that the trial court erred in entertaining the application.[181] It has also been held by a majority in the Court of Appeal that it is immaterial whether or not the judgment-creditor failed to challenge the assumption of jurisdiction by a court to set aside the registration of a foreign judgment (which was an English judgment in this case) that has been brought by way of motion on notice, instead of petition; such a registration can successfully be challenged on appeal for the first time.[182] The rationale for this approach is that if a rule of procedure prescribes a manner for bringing a matter, it is the manner prescribed by the enactment that must be followed, and not any other method.[183] In other words, rules of court must be obeyed.[184] Also, a judgment-debtor who approaches the court to exercise its discretion to set aside a registered foreign judgment must approach the court

[178] See generally *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606; *Mudasiru v Abdullahi* (2009) 17 NWLR 547; *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR 1; *Consolidated Contractors (Oil and Gas) Company SAL v Masiri* (2011) 3 NWLR 283.

[179] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 25 (Ogbuagu JSC).

[180] See also *Momah v VAB Petroleum Inc (Momah I)* (2000) 4 NWLR 534. *Cf 21st Century Technologies Ltd v Teleglobe America Inc* (2013) 3 NWLR 99, 117 (Okoro JCA as he then was) where curiously, the Court of Appeal reached a contrary conclusion. It appears the Court of Appeal failed to appreciate the distinction between the registration and execution of a foreign judgment.

[181] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606; *Kabo Air Ltd v The O' Corporation Ltd* (2014) LPELR-23616 (CA) 23–24; *Hyden Petroleum Ltd v Planet Maritime Co* (2018) LPELR-45553 (CA) 23–28; *Bronwen Energy Trading Ltd v Crescent Africa (Ghana) Ltd* (2018) LPELR-43796 (CA) 10–21.

[182] *Mudasiru v Abdullahi* (2009) 17 NWLR 547; *Bronwen Energy Trading Ltd v Crescent Africa (Ghana) Ltd* (2018) LPELR-43796 (CA) 10–21.

[183] *Mudasiru v Abdullahi* (2009) 17 NWLR 547, 561; *Bronwen Energy Trading Ltd v Crescent Africa (Ghana) Ltd* (2018) LPELR-43796 (CA) 10–21.

[184] *Mudasiru v Abdullahi* (2009) 17 NWLR 547, 568; *Bronwen Energy Trading Ltd v Crescent Africa (Ghana) Ltd* (2018) LPELR-43796 (CA) 10–21.

in strict compliance with the provisions of the rules of court.[185] This approach favours the judgment-creditor and has the merit of facilitating the enforcement of foreign judgments.

However, this latter approach is open to question, as it promotes technical justice at the expense of substantial justice. It is another area of Nigerian law where some Nigerian judges have failed to appreciate the difference between procedural and substantive jurisdiction. Procedural jurisdiction can be waived but not substantive jurisdiction.[186] It is, therefore, submitted here that where the judgment-creditor does not challenge a wrong procedure for setting aside registration of a foreign judgment, he should be deemed to have waived his rights and acquiesced to such a procedure, as the rules of court aim at substantial justice and not technical justice.[187]

(ii) Grounds for Refusal to Register/Setting Aside Registration of a Foreign Judgment

Section 3(2)(a) to (f) of the 1922 Ordinance provides the grounds upon which a judgment may be refused registration. The Supreme Court has held that the use of the word 'or' in between the enumerated grounds under Section 3(2)(a) to (f) of the 1922 Ordinance means that it is disjunctive and not conjunctive, so that one cannot rely on the two or more grounds at the same time.[188]

It is submitted that this judgment is open to question, as it is based on a misinterpretation of the word 'or'. Though the use of the word 'or' is disjunctive, the manner in which the word 'or' is used in Section 3(2) of the 1922 Ordinance is another way of stating that any of the grounds under 3(2)(a) to (f) would lead the court to not register a foreign judgment, so that if more than one of these grounds exist, it increases the judgment-debtor's chance of ensuring the judgment is not registered, or if registered, should be set aside.

The first three grounds (Section 3(2)(a) to (c)) encompass what is known as international competence under common law. This means that the foreign court should have jurisdiction in the eyes of Nigerian private international law, and Nigerian courts, in ascertaining jurisdiction, are not concerned with the internal law of the foreign country.

[185] *Mudasiru v Abdullahi* (2009) 17 NWLR 547, 560–61 (Salami JCA, as he then was); *Bronwen Energy Trading Ltd v Crescent Africa (Ghana) Ltd* (2018) LPELR-43796 (CA) 10–21.

[186] See generally *Odua Investment Co Ltd v Talabi* (1997) 10 NWLR (Pt. 523) 1. This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail* (2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23–25; *NNPC v Zaria* (2014) LPELR-22362 (CA) 58–60; *Obasanjo Farms (Nig) Ltd v Muhammad* (2016) LPELR-40199 (CA).

[187] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606 also appears to support the doctrine of waiver, though it was not applicable on the facts of the case.

[188] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 491 (Nweze JSC) affirming the Court of Appeal's decision in *Conoil Plc v Vitol SA* (2012) 2 NWLR 50.

The first ground is where the original court acted without jurisdiction.[189] An original court would have jurisdiction in the eyes of Nigerian law where the defendant was resident within the court's jurisdiction or agreed to submit to the court's jurisdiction.

The second ground is where a judgment-debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise agree to submit to the jurisdiction of that court.[190] It has been held that Section 3(2)(b) is intended to avail a judgment-debtor who can establish that, although the foreign court had jurisdiction to entertain the action, the judgment-debtor is still not bound because the judgment-debtor was not resident or carrying on business within the court's jurisdiction, did not voluntarily appear in the proceedings, or did not submit to the court's jurisdiction.

Another way of interpreting Section 3(2)(b) is that the original court would have jurisdiction if any of these conditions were met, eg, where a judgment-debtor is not carrying on business within the jurisdiction of the court nor ordinarily resident within the jurisdiction of the court, but voluntarily appears in the proceedings (such as assigning a counsel to defend the case on its behalf).[191] Another instance is where a judgment-debtor submits to the jurisdiction of the court, such as by entering an unconditional appearance to defend the case on its merits, by appealing the decision of the original court on the merits without challenging its jurisdiction on appeal,[192] or by agreeing to submit to the court's jurisdiction (e.g. entering into a choice of court agreement designating the original court).[193] Any of these conditions is sufficient to give the original court jurisdiction. In other words, they operate disjunctively and not conjunctively.

Also related to interpreting Section 3(2)(b) is a decided case where the judgment-debtor was successful in setting aside the trial court's decision to register an English judgment because the judgment-debtor was not resident in UK (and instead was resident in Nigeria), did not agree to submit to the original court's jurisdiction, and refused to submit to the jurisdiction of the English courts, despite service on the judgment-debtor through the 'long-arm' procedure. The judgment-debtor thereby avoided his obligation to pay his debt. The Supreme Court Justices, in strong terms, condemned this situation as militating against international trade and commerce, and called for reform.[194]

[189] 1922 Ordinance s 3(2)(a).

[190] 1922 Ordinance s 3(2)(b). See generally *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309 for the interpretation of s 3(2)(b).

[191] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 21.

[192] ibid, 21.

[193] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 21; *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 75–76.

[194] *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309.

The third ground is where the judgment-debtor was the defendant in the proceedings, and was not duly served with the process of the original court, and therefore did not appear, notwithstanding the fact that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court.[195] The main issue that arises regarding the third ground is how the registering court determines whether the judgment-debtor was duly served. Is this to be determined under Nigerian law or foreign law? In *Ramon v Jinadu* ('*Ramon*'),[196] the Court of Appeal held that a process could only be 'duly served' for the purpose of Section 3(2)(c) if it was served in accordance with Nigerian law, so an English judgment resulting from a process duly served in accordance with English law but not Nigerian law shall not be registered.[197] If registered, it should be set aside.[198]

In *Calais Shipholding Co v Browen Energy Trading Ltd*,[199] an issue that arose in the interpretation of Section 3(2)(c) was whether a judgment-debtor was entitled to notice in the enforcement of an arbitral award that was registered *ex parte* in the English High Court. The Court of Appeal held in the negative. Oseji JCA, in delivering the leading judgment (which was unanimously agreed with by other members of the Court of Appeal), held that:

> To my mind therefore the import of paragraph (c) of section 3(2) is that it envisages a situation where a formal trial or hearing had taken place in the court and the processes necessary for hearing of the matter were not served on the party who is the defendant. In other words, a judgment obtained in a court of trial by a plaintiff in the absence of the defendant who was not duly served with the necessary processes and afforded the opportunity to react to it and defend the allegation against him is precluded from registration as a foreign judgment under section 3(2)(c).
>
> Put in another way, any claim before a court which is eventually granted by the said court (original court) without the defendant against whom such claim is made, being served with the processes or made aware of the said claim cannot subsequently be registered as a foreign judgment in any court in Nigeria.
>
> It seems to me that the intention of the legislature here is to safeguard the interest of a judgment debtor against any frivolous or suspicious judgment being registered and executed against him without having been duly served with the processes connected with the claim in the foreign country.[200]

In applying the law to the facts of the case, Oseji JCA held that:

> On the strength of the above cited authorities, this court refuses to add its weight to a simplistic interpretation of section 3(2)(c) of the said Ordinance to the extent of defeating its aim and objective given the fact that such an approach will be absurd and engender injustice.

[195] 1922 Ordinance s 3(2)(c).
[196] (1986) 5 NWLR 100.
[197] *Ramon v Jinadu* (1986) 5 NWLR 100, 108.
[198] ibid, 108–9. *Cf Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108.
[199] (2015) All FWLR 1765.
[200] *Calais Shipholding Co v Browen Energy Trading Ltd* (2015) All FWLR 1765, 1782–83.

> Though the hearing and determination of the dispute between the parties took place in an arbitration tribunal which record shows that both parties duly participated and the respondent even filed a counter-claim thereat, the said tribunal can be likened to the original court where the respondent was the defendant and against whom the final award was made.
>
> This put paid to the dispute between the parties in the absence of any objection or appeal against the award. The venture to the High Court of England by the appellant was to register the final award of the arbitration tribunal as a judgment of the said court for the purpose of enforcement and the English Rules allow such application to be made *ex parte*. This to my mind is not out of place as there was nothing else left, save for the judgment-debtor to comply with the award or for the judgment creditor to apply to enforce the said award.[201]

The fourth ground is where the judgment was obtained by fraud.[202] In *Mudasiru v Onyearu*,[203] the first respondent (the 'judgment-creditor') acted as counsel to the second to sixth respondents in an action they filed in the English High Court against the first appellant, seeking to restrain her from taking possession of her deceased husband's body. The second to sixth respondents claimed they were executors of the deceased's will. The English High Court initially made an *ex parte* order in their favour, which was subsequently discharged by the same court, based on the ground that they made fraudulent and false representations of material facts. Having lost their claim, the second to sixth respondents refused to pay the judgment-creditor, who brought an action against them for his legal fees. He got judgment in the English High Court. In that judgment, the judgment-creditor sued the second to sixth respondents in their capacity of trustees of the estate of the deceased. The judgment-creditor sought to register the English judgment in the Lagos State High Court. The first appellant applied to be joined as an interested party pursuant to the Lagos State High Court Rules,[204] and challenge the registration against her husband's estate. The trial court refused the application. On appeal, the Court of Appeal set aside the ruling of the trial judge and held, *inter alia*, that the English High Court's decision establishing fraud by the second to sixth respondents regarding how they represented themselves as the representatives or trustees of the deceased's estate was a strong reason why the English Court's judgment for the judgment-creditor should not be registered in Nigeria against the deceased's estate.

The fifth ground is where the judgment-debtor satisfies the registering court either that an appeal is pending or that it is entitled and intends to appeal against the judgment.[205]

[201] ibid, 1783.
[202] 1922 Ordinance s 3(2)(d).
[203] (2013) 7 NWLR 419.
[204] Order 13 r 17 of the High Court of Lagos State (Civil Procedure) Rules 2004.
[205] 1922 Ordinance s 3(2)(e).

The sixth ground is where the judgment was in respect of a cause of action, which, for reasons of public policy or for some other similar reason, could not have been entertained by the registering court.[206] In interpreting Section 3(2)(f) of the 1922 Ordinance, public policy has been defined as the 'policy of not sanctioning an act which is against public interest in the sense that it is injurious to the public welfare or public good'.[207] It has also been held in this regard that the words 'for other similar reason' used after the words 'public policy' is to be construed *ejusdem generis* so that the phrase 'for other similar reason' ought to be confined to matters that are against the public interest, in the sense that they are injurious to public welfare or public good, so that abuse of court processes does not fall within the meaning of 'for other similar reason'.[208]

In interpreting Section 3(2)(f), the Court of Appeal in *Ramon*[209] held that the purpose of this section is to prohibit every Nigerian court from registering a judgment in respect of which if the action were filed in Nigeria, it would have been dismissed on grounds of illegality.[210] Thus, the Court of Appeal in *Ramon* set aside a judgment of a trial court which registered an English judgment dealing with foreign exchange, contrary to the provisions of Section 3 of the then Exchange Control Act,[211] which prohibited transacting in foreign exchange outside Nigeria without the consent of the Minister of Finance. As the Exchange Control Act has now been repealed, *Ramon* is only useful here to the extent of the test it provided in relation to interpreting Section 3(2)(f) of the 1922 Ordinance. In other words, registering a foreign judgment where the parties in the original court action dealt in foreign exchange, without obtaining the permission of the Minister of Finance, would not be contrary to public policy.[212]

The Court of Appeal has held that it is not against public policy or other similar reasons to register a foreign judgment which seeks to recover a debt against a legal person in Nigeria.[213] On appeal, the Supreme Court held that the policy of Nigerian courts is to hold parties to their agreements.[214]

C. Original versus Registering Court

The relationship between the original court and registering court is significant, as it is a theme that is sometimes reflected in the decisions of Nigerian appellate

[206] ibid, s 3(2)(f).
[207] *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 92.
[208] ibid.
[209] (1986) 5 NWLR 100.
[210] *Ramon v Jinadu* (1986) 5 NWLR 100, 110.
[211] 1962 Cap 113 LFN 1990.
[212] See also the observations of Ogundare JSC in *Koya v United Bank for Africa* (1997) 1 NWLR 251.
[213] *Conoil Plc v Vitol SA* (2012) 2 NWLR 50.
[214] *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 489–90 (Nweze JSC); 497 (Kekere-Ekun JSC); 500 (Okoro JSC); 501–2 (Eko JSC).

judges. In *Adwork Ltd v Nigeria Airways Ltd*,[215] the Court of Appeal, drawing from English jurisprudence, provided some guidance that is relevant to the relationship between the original and registering court.[216] On the issue of registration, it held that the original court which gave judgment does not lose its jurisdiction in relation to the execution process in the case just because the judgment has been registered in a foreign country. This is because the judgment-creditor could be enforcing the judgment in both jurisdictions – wherever they can find the judgment-debtor's property.

However, once it is recognised that a registering court has the same power with respect to execution as the original court, it becomes necessary for the registering court to closely monitor what the originating court is doing in relation to the execution of a particular registered judgment. This is to ensure that there is no conflict on the exercise of powers as to execution between the registering court and the court which originally gave the judgment.[217]

The process of execution may take different forms and may necessitate ancillary proceedings. In the quest to eliminate any conflict of jurisdiction as to execution between the registering court and the original court, it is important for the courts to discover what is being done or has been done by either of them at a particular time, before either assumes jurisdiction. It boils down to both courts necessarily taking practical steps to prevent an abuse of their execution process rather than the proclamation of principles.[218]

When a judgment has been pronounced and no appeal is brought by the parties, the execution of the judgment normally follows. All types of applications may follow, and these usually include stay of execution, instalment payment, variation, and so on. It appears that applications other than those directed specifically at obtaining satisfaction of the judgment are properly brought before the court which originally gave the judgment, even in cases where the judgment has been registered in a foreign court. On the other hand, applications for the execution of writs taken out in the registering court ought to be heard by the registering court. This is without prejudice to the power of the court which originally gave the judgment to enforce its judgment by execution, even when the judgment has been registered in a foreign court.

Where a judgment has been satisfied in the original court, the interest of the judgment-creditor has been served and therefore, any further registration would serve no beneficial purpose but would merely be a waste of time. There would be nothing more to pursue. In addition, any judgment which, by its nature, cannot

[215] (2000) 2 NWLR 415.
[216] Though the Court of Appeal made reference to the UK 1933, those comments are quite apposite to this discussion.
[217] *Adwork Ltd v Nigeria Airways Ltd* (2000) 2 NWLR 415.
[218] ibid.

be enforced by execution in the country of the original court is also incapable of being enforced in Nigeria.[219]

On the issue of setting aside, it has been held that it is not the duty of the court entertaining an application for the registration of a foreign judgment to sit as an appellate court over the judgment of the original court to review or expatiate on the judgment.[220] The judgment-debtor is expected to have exercised its right of appeal under the laws of the foreign country. All that the court to which the application is made needs to do is ensure that the judgment-debtor complies with the requirements of Nigerian law on the registration of a foreign judgment.[221]

Where the registration of a foreign judgment has been validly set aside in Nigeria, such judgment remains a valid judgment of the foreign court, which the judgment-creditor could enforce in the forum of the original court.[222]

D. Foreign Currency Judgments

The 1922 Ordinance has no provision relating to registration of judgments in foreign currency. Thus, the common law regime discussed in Chapter seventeen of this volume applies.[223]

E. Limitation of Actions

The time limit within which a foreign judgment can be registered under the 1922 Ordinance is 12 months, with the possibility of an extension of time with leave of

[219] This position of the law is actually influenced by s 4(1)(a)–(b) of the 1960 Act, which is not yet operational, though its provisions are simply based on practical policy reasons. See also *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 146.

[220] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 23–24 (Akintan JSC); *Conoil Plc v Vitol SA* (2012) 2 NWLR 50, 80 (Bada JCA); *Conoil Plc v Vitol SA* (2018) 9 NWLR 463, 490–92 (Nweze JSC), 499 (Eko JSC). See also *Mudasiru v Abdullahi* (2009) 17 NWLR 547, 565 (Salami JCA). See also *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 134.

[221] *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 23–24 (Akintan JSC); *Mudasiru v Onyearu* (2013) 7 NWLR 419, 445 (Danjuma JCA).

[222] See also *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR 1, 28.

[223] See *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1, 20 (Mohammed JSC) – '… until the provisions of Section 4 of the 1990 Act [1960 Act] comes into force in accordance with section 3 of the same Act there is no restriction for any superior court in Nigeria to register a foreign judgment in foreign currency'. See also the concurring judgment of Ogbuagu JSC on p 29 '… the decision of the court below, is not liable to be set aside, for the reason that the English Court judgment was registered in foreign currency and not in Nigerian Naira. The above decisions [relating to enforcement of judgment in foreign currency] were given after the enactment of the … [1960 Act]. So, they put at rest, any imagined/conceived controversy of the power of a Nigerian Court to so register.' The problem with these judicial statements is that they do not clearly state that it is the common law regime that applies [in the absence of an order of the Minister of Justice] in registering foreign judgments under the 1922 Ordinance. This inference may still legitimately be drawn, however, despite the ambiguity.

the registering court.[224] In the case of *Ramon*,[225] the plaintiff-appellant obtained a judgment from the English High Court on 1 October 1980. The plaintiff-appellant, by a motion *ex parte* dated 17 April 1984, applied for an order to register and enforce the judgment against the defendant-respondent in the High Court of Lagos. The order was granted, at which time the judgment was three and a half years old, and there was no application for an extension of time to register the judgment. On 6 November 1984, the defendant, by a Motion on Notice, applied for an order that the registration of the judgment be set aside, *inter alia*, on the ground that the judgment was not registered within the 12-month limitation period specified under Section 3 of the 1922 Ordinance. The trial court dismissed the application. On appeal to the Court of Appeal, Nnaemeka-Agu JCA (as he then was), with whom other Justices unanimously agreed, brilliantly held as follows:

> Registration after the expiration of twelve months from the date of the judgment involves an exercise of the court's discretion whether or not to register the judgment. Like all cases of extension of time it is important that the applicant must explain to the satisfaction of the court why he did not register the judgment within time … In the exercise, the conduct of the applicant throughout from the date of the writ to the date of the application is relevant … The applicant must place before the Court materials upon which the discretion may be exercised in his favour. Indeed the time within which the application is made goes to the jurisdiction of the court: where the application is made within twelve months the court has power to authorize the registration of the judgment subject only to the provisions of the Act; but where it is made after twelve months it can only do so if there are materials placed before it sufficient to explain the failure to register the judgment within time. In the instant case in which the registration of the judgment was made some three-and-a-half years [after] the date of judgment but no application was made for enlargement of time to do so, it is my view that the exercise was a nullity. For it is settled that a court can only extend time on the application of the party in default and for good cause shown.[226]

The 12-month limitation period has been applied in other cases by Nigerian appellate courts (including the Supreme Court), though, as discussed above, some of these decisions made an incorrect reference to Section 10(a) of the 1960 Act.[227] Also, these cases did not really discuss in detail the criteria for applying the limitation period under the 1922 Ordinance, when compared to the comprehensive judgment of Nnaemeka-Agu JCA (as he then was) in *Ramon*.

The onus is on the judgment-creditor to establish that the action was filed within the 12-month period, in the event the judgment-debtor challenges the registration of the foreign judgment on this basis.[228] It is thus prudent for the

[224] 1922 Ordinance s 3(1).
[225] (1986) 5 NWLR 100.
[226] *Ramon v Jinadu* (1986) 5 NWLR 100, 106.
[227] *Macaulay v RZB of Austria* (2003) 18 NWLR 282; *Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622; *Witt & Busch Ltd v Dale Power Systems Plc* (2007) 17 NWLR 1.
[228] See generally *VAB Petroleum Inc v Momah (Momah II)* (2013) 14 NWLR 284, 332–33.

judgment-creditor to pay attention to the date on which the judgment was delivered in the foreign court and the time within which it is filed in the Nigerian court, in order to avoid unpleasant consequences of the registration of the judgment being set aside.[229]

Generally, the judgment-creditor should not be able to circumvent legal restrictions on the enforcement of a judgment in its country of origin merely by relying on a longer period for registration afforded in Nigeria.[230] For example, under Utopian law, the enforcement of a Utopian judgment must be enforced within six months after it is given. If an application to register a Utopian judgment in Nigeria is made six months after it is given, the application should also be dismissed, or, if the judgment is registered, it should be set aside, even though it has been brought within the Nigerian 12-month registration time-frame. This is because in Nigeria, a court should not register a foreign judgment if the judgment could not be enforced by execution in the foreign country at the date of the application.

V. Enforcement of Foreign Judgments under the 1960 Act

This section discusses the provisions of the 1960 Act in relation to the registration of foreign judgments. Although the 1960 Act is not yet in force, it is useful to discuss some of its provisions. It is again submitted that the cases (discussed below) which applied the 1960 Act in the absence of an order of the Minister of Justice were reached *per incuriam*, irrespective of whether the provisions of the 1960 Act (such as Section 10(a)) were applied together with the provisions of the 1922 Ordinance to a designated or non-designated country under the 1922 Ordinance, or whether the provisions of the 1960 Act were applied alone as the applicable statutory regime. That said, if the Minister's order is made, the cases which have interpreted the 1922 Ordinance would also be useful in interpreting the 1960 Act, where the provisions of the 1922 Ordinance and the 1960 Act in question are similar.[231]

[229] *VAB Petroleum Inc v Momah (Momah II)* (2013) 14 NWLR 284, 332–33. In this case, IT Muhammad JSC observed that the judgment-creditor did not exhibit the time within which the action was filed in Nigeria, so Muhammad JSC opted for the date the judgment was delivered in computing the 12-month period. This approach is questionable.

[230] Although this provision is contained in s 4(1)(a)–(b) of the 1960 Act, which is not yet applicable, it appears that, on practical policy grounds, it would not be proper to register a judgment that cannot be registered in the original court. See also RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge, Cambridge University Press, 2013) 392–93.

[231] For a similar [judicial] observation, see *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62, 70 (Oguntade JCA as he then was); *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309, 339 (Oguntade JSC), 349 (Ogbuagu JSC); *Shona-Jason (Nig) Ltd v Omega Air Ltd* (2006) 1 NWLR (Pt. 960) 1, 40–41.

A. Registering the Foreign Judgment

The judgment-creditor may apply to a superior court of Nigeria to have the foreign judgment registered, and on any such application, the court shall, subject to the relevant provisions of the 1960 Act, order the judgment to be registered.[232] The foreign judgment must have been final and conclusive between the parties, notwithstanding that it may be subject to an appeal or that an appeal may be pending in the foreign court.[233]

The Court of Appeal has held that the burden of proof that a foreign judgment meets the legal requirement for registration rests on the party who propounds the judgment.[234] However, another Court of Appeal has held that once an applicant presents facts to support the pre-requisites under Section 4 of the 1960 Act, the court must presume the foreign court had jurisdiction, in registering the foreign judgment.[235]

Where a judgment is registered under the 1960 Act, it shall, for the purposes of execution, be of the same force and effect,[236] proceedings may be taken on a registered judgment,[237] the sum for which a judgment is registered shall carry interest,[238] and the registering court shall have the same control over the execution of a registered judgment, as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.[239]

Execution, however, shall not be an issue on the judgment so long as, under Part 1 of the 1960 Act and the rules of court made thereunder, any party is competent to make an application to have the registration of the judgment set aside, or, where such application is made, execution shall not be an issue until after the application has been finally determined.[240]

Where it appears to the registering court, at the date of the application for registration of a judgment in respect of different matters, that some but not all of the provisions of the judgment could have been properly registered if contained in separate judgments, those judgments may be registered in respect of the provisions aforesaid, but not in respect of any other provisions contained therein.[241]

In addition to the sum of money payable under the judgment of the original court, including any interest which becomes due under the judgment – up to the time of registration – by the law of the country of the original court, the judgment

[232] 1960 Act s 4(1).
[233] *21st Century Technologies Ltd v Teleglobe America Inc* (2013) 3 NWLR 99.
[234] *Hyppolite v Egharevba* (1998) 11 NWLR 598, 616.
[235] *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 147.
[236] 1960 Act s 4(2)(a).
[237] ibid, s 4(2)(b).
[238] ibid, s 4(2)(c).
[239] ibid, s 4(2)(d).
[240] Proviso to s 4(2) of the 1960 Act.
[241] 1960 Act s 4(5).

shall be registered for the reasonable costs of, and incidental to, registration, including the costs of obtaining a certified true copy from the original court.[242]

B. Refusal to Register, and Setting Aside Registration of the Foreign Judgment

A judgment shall not be registered under the 1960 Act if, at the date of application, it has been wholly satisfied or could not be enforced by execution in the country of the original court.[243]

The 1960 Act does not make provision for the manner in which an application for setting aside a registered judgment may be filed in court, and no rules of court have been made pursuant to the 1960 Act prescribing any format for applying to set aside a foreign judgment in the absence of an order of the Minister of Justice making the 1960 Act functional.[244]

The Court of Appeal has held that, in calling on the court to set aside the registration of a foreign judgment, all an alleged judgment-debtor is entitled to do is examine the materials on which the registration was based to see if all the antecedent legal requirements were satisfied.[245] It has also been held that once a judgment has been registered, the registration can be set aside by the same High Court if the need arises, so that it is not material or fatal where a judge other than the judge who considered the application to register a foreign judgment assumes jurisdiction to set aside the registration.[246]

Section 6 of the 1960 Act provides extensive grounds upon which a registered foreign judgment would be set aside, where an application is made by any party against whom the registered judgment may be enforced.[247] These grounds are not cumulative; that is, any one of the grounds, if satisfied, is a sufficient basis for the court to set aside the registration of a foreign judgment.[248]

(i) Registration in Contravention of the 1960 Act

One of these grounds is that the judgment is not one to which the 1960 Act applies or was registered in contravention of the provisions of the 1960 Act.[249]

[242] ibid, s 4(6).

[243] Section 4(1)(a)–(b) of the 1960 Act. See *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 146.

[244] 1960 Act ss 3 and 5. *Cf Hyppolite v Egharevba* (1998) 11 NWLR 598, 609.

[245] *Hyppolite v Egharevba* (1998) 11 NWLR 598, 619.

[246] ibid, 619.

[247] The party in question may be the judgment-debtor, who was the defendant in the original court. It may also be a person who was not a party to the proceedings but is interested in setting aside the foreign judgment which adversely affects its interest. See also *Mudasiru v Onyearu* (2013) 7 NWLR 419.

[248] *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62.

[249] 1960 Act s 6(1)(a)(i).

(ii) Lack of Jurisdiction in the Original Court

Another very important ground is where the original court had no jurisdiction in the circumstances of the case. In the case of a judgment given in an action *in personam*, the original court is deemed to have had jurisdiction based on one or more of five listed conditions.[250] The Court of Appeal has held that any of these five conditions will afford jurisdiction to the foreign court.[251] In other words, it is not the requirement of the Act that all the five conditions must co-exist to confer jurisdiction.[252]

The first condition is where the judgment-debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings for a reason other than protecting or obtaining the release of property seized or threatened with seizure, or of contesting the jurisdiction of that court.[253]

The second condition is where the judgment-debtor counterclaimed in the proceedings in the original court or was a plaintiff.[254]

The third condition is where, before the commencement of the proceedings, the judgment-debtor, being a defendant in the original court, had agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.[255]

The fourth condition is where, at the time when the proceedings were instituted, the judgment-debtor, being a defendant in the original court, was resident in, or, being a corporate body, had its principal place of business in the country of that court.[256]

The fifth condition is if the judgment-debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.[257]

A foreign court is deemed to have jurisdiction in the case of a judgment given in an action where the subject matter was immovable property or in an action *in rem* where the subject matter was movable property, if the property in question was, at the time of the proceedings in the original court, situate in the country of that court.[258]

[250] 1960 Act s 6(2)(a). See also *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62.
[251] *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62, 75–6 (Onnoghen JCA as he then was).
[252] ibid, 75–76 (Onnoghen JCA as he then was).
[253] 1960 Act s 6(2)(a)(i).
[254] ibid, s 6(2)(a)(ii).
[255] ibid, s 6(2)(a)(iii). See generally also *Witt & Busch Ltd v Dale Power Systems Plc* (2001) 33 WRN 62; *Union Petroleum Services v Petredec Ltd* (2014) 2 CLRN 104.
[256] 1960 Act s 6(2)(a)(iv). See also *Hyppolite v Egharevba* (1998) 11 NWLR 598, 613–14.
[257] ibid, s 6(2)(a)(v).
[258] ibid, s 6(2)(b).

A foreign court is also deemed to have jurisdiction if its jurisdiction is recognised by the law of the registering court.[259] This is otherwise known as jurisdictional equivalence. Thus, where a foreign court assumes jurisdiction through service of court processes outside its territorial jurisdiction (otherwise known as 'assumed jurisdiction' in Nigerian conflict of laws), such a court would be deemed to have jurisdiction in the eyes of Nigerian private international law because this is a basis upon which the Nigerian court would assume jurisdiction as well.

Section 6(3) of the 1960 Act, however, provides that, notwithstanding the provisions of Section 3(2) of the 1960 Act, the courts of the country of the original court shall be deemed *not* to have jurisdiction on three grounds. The first is where the subject matter of the proceedings was immovable property outside the country of the original court.[260] The second is where the proceedings in the original court were contrary to a choice of court agreement designating the court of another country, provided that the defendant does not submit to the jurisdiction of the original court in any of the ways provided by Section 3(2)(a)(i) to (iii) of the 1960 Act.[261] In other words, where there has been submission to the jurisdiction of the original court (as specified under any of the provisions under Section 3(2)(a)(i) to (iii) of the 1960 Act), the court's assumption or exercise of jurisdiction – despite a choice of court agreement designating another country – would be valid for the purposes of registering the judgment under Nigerian law.[262] The third condition is where the judgment-debtor was a defendant in the original court and was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the courts of the original court and did not submit to the jurisdiction of the court.[263] This third condition is somewhat ambiguous, as it is not clear if the reference to 'public international law' means in the eyes of Nigerian law, the law of the original court, or customary international law in general. Where any of these interpretations are conflicting, problems could arise. It is submitted that since the foreign provisions of the 1960 Act utilise the criteria of international competence (and jurisdictional equivalence) as a basis for registering a foreign judgment in the eyes of Nigerian law, it appears that the reference to 'public international law' should mean in the eyes of Nigerian law.

[259] ibid, s 6(2)(c).
[260] ibid, s 6(2)(a).
[261] ibid, s 6(3)(b).
[262] This makes practical sense and is an equivalent basis upon which the Nigerian appellate courts would refuse to set aside the trial court's exercise of jurisdiction in breach of a forum selection clause. In other words, a party who submits to the court's jurisdiction is not capable of validly contesting the court's exercise of jurisdiction in breach of a choice of court agreement. See generally the cases of *Allied Trading Company Ltd v China Ocean Shipping Line* (1980) 1 ALR Comm 146; *GBN Line v Allied Trading Co Ltd* (1985) 2 NWLR (Pt. 5) 74; *Unipetrol Nigeria Ltd v Prima Alfa Enterprises* (*Nig*) *Ltd* (1986) 5 NWLR 532, 537–38; *Akpaji v Udemba* (2003) 6 NWLR (Pt. 815) 169.
[263] 1960 Act s 6(3)(c).

(a) Service of Court Process

A registered judgment would be set aside where the judgment-debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that the process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend, and did not appear.[264]

The Court of Appeal has held in *Teleglobe I* that the issue of service of originating process is not an issue that can be considered by the registering court in granting or refusing to register a foreign judgment, as it is not part of the grounds provided under the 1960 Act for setting aside a judgment. Where service of a court process is valid under the laws of a foreign country, a Nigerian court cannot seek to set aside the registration of the foreign judgment on the ground that it violates Nigerian law.[265] This decision is open to question. Though the decision aims at protecting the rights of the judgment-creditor, it does not sufficiently protect the judgment-debtor. As a matter of public policy, the judgment-debtor should be entitled to rely on the Nigerian standard on the issue of service, since this also touches on the constitutional right to a fair hearing in Nigeria.

In a later case, the Court of Appeal held that

> the lower court was right when it held that the Civil Law Court in Liberia had no jurisdiction over the respondent for reason of failure to give notice of the proceedings that led to the judgment that is sought to be registered to the respondent.[266]

It appears that the Court of Appeal, in this latter case, relied on the Nigerian standard of what constitutes a valid service of court process.

(b) Fraud

A registered judgment would be set aside where there is fraud.[267]

(c) Public Policy

A foreign judgment would be set aside if its enforcement would be contrary to public policy in Nigeria.[268] Public policy has been judicially defined to mean 'community sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like.'[269] In *Dale Power Systems Plc v Witt & Busch Ltd*,[270] the Court of Appeal held that 'public

[264] ibid, s 6(1)(a)(iii).
[265] *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 141–42.
[266] *Catco Corporation Organised v African Reinsurance Corporation* (2010) All FWLR 677, 694 (Galinje JCA).
[267] 1960 Act s 6(1)(a)(iv).
[268] ibid, s 6(1)(a)(v).
[269] *Dale Power Systems Plc v Witt & Busch Ltd* (2001) 33 WRN 62, 77.
[270] (2001) 33 WRN 62.

policy in Nigeria supports the fact that parties should be made to honour obligations entered into voluntarily between themselves'.[271] Thus,

> it is not contrary to public policy in Nigeria to enforce a foreign judgment in Nigeria against a company which obtained goods on credit from a foreign company but has failed to honour its obligation to pay the sum for them and does not deny the existence of the liability to pay for same.[272]

It is also 'not contrary to public policy in Nigeria to enforce a foreign judgment against a Nigerian company which voluntarily submitted to the jurisdiction of the foreign country's court and actively participated in that foreign country leading to judgment'.[273]

(d) Rights not Vested in the Judgment-Creditor

A judgment may be set aside if the rights under the judgment are not vested in the person by whom the application for registration was made.[274]

(e) *Res Judicata*

A judgment may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had, on the date of the judgment in the original court, previously been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.[275]

C. Original versus Registering Court

In addition to the observations made above when discussing this issue in respect of the 1922 Act, under the 1960 Act, the judgment of a foreign court shall not be registered in respect of the whole sum payable under the judgment of the original court but only in respect of the balance remaining payable if, at the date of the application for registration, the judgment of the original court has been partly satisfied.[276] In interpreting this provision, it has been held that where a judgment-creditor applies before a registering court for execution, it is open to the judgment-debtor to show that he has paid the full or part of the judgment for which the execution process is being sought.[277]

[271] *Dale Power Systems Plc v Witt & Busch Ltd* (2001) 33 WRN 62, 78.
[272] ibid, 78.
[273] ibid, 78.
[274] 1960 Act s 6(1)(a)(vi). See also *Mudasiru v Onyearu* (2013) 7 NWLR 419.
[275] ibid, s 6(1)(b).
[276] ibid, s 4(4).
[277] *Adwork Ltd v Nigeria Airways Ltd* (2000) 2 NWLR 415.

It has also been held that there are two main rationales for the above position.[278] Both rationales are contained in Section 4(1)(a) and (b) of the 1960 Act. The first is that 'where a judgment has been satisfied, the interest of the judgment-creditor had been served and therefore any further registration of same would serve no beneficial purpose but [be] a mere waste of time. There would be nothing more to pursue.'[279] The second is that 'any judgment which by its nature cannot be enforced by execution in the country of the original court would certainly and invariably encounter the same situational characteristics wheresoever else.'[280]

D. Pending Appeal

Section 7 of the 1960 Act addresses the situation where there is a pending appeal in the original court at the time the judgment-creditor seeks to register a foreign judgment. Section 7(1) provides that if the applicant applying to set aside the registration of a judgment satisfies the registering court that an appeal is pending, or that he is entitled to appeal against the judgment, the court, if it thinks fit and just, may either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take necessary steps to have the appeal disposed of by the competent tribunal.

Section 7(2) provides that where the registration of a judgment is set aside under Section 7(1), or solely for the reason that the judgment was not, at the date of the application for registration, enforceable by execution in the country of the original court, the setting aside of the registration shall not prejudice a further application to register the judgment when the foreign appeal has been disposed of or the judgment becomes enforceable in the original court, as the case may be.

Section 7(3) provides that where the registration of a judgment is set aside solely for the reason that the judgment was registered for the whole sum payable thereunder notwithstanding that it had, at the date of the application for registration, been partly satisfied, the registering court shall, upon application of the judgment-creditor, order judgment to be registered for the balance remaining payable at that date.

Section 13 of the 1960 Act, subject to the payment of prescribed fees by the judgment-creditor, empowers the High Court to grant a judgment-creditor a certified true copy of a judgment with a certificate (containing such particulars with respect to the action) for a fixed-sum money judgment that has been entered in a superior court in Nigeria against any person if the judgment-creditor is desirous of enforcing the judgment in a country or territory to which Part 1 of the

[278] *Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108, 146.
[279] ibid, 146.
[280] ibid, 146.

1960 Act applies through an order of the Minister of Justice. However, the proviso to Section 13 of the 1960 Act provides that it does not apply where the execution of a judgment is stayed for any period pending an appeal (or for any other reason), until the expiration of the period in question.

The authors have made reference to Sections 7 and 13 of the 1960 Act because the true purport of this provision appears to have been misconceived by counsel and the Supreme Court in *VAB Petroleum Inc v Momah (Momah II)*, when they construed Sections 7 and 13 of the 1960 Act together.[281] The provisions of Section 7 and 13 of the 1960 Act are actually unrelated provisions.

Section 7 of the 1960 Act addresses a situation where there is a *pending appeal* in the *original or foreign court* (not a Nigerian court) at the time the judgment-creditor seeks to register a foreign judgment. On the other hand, Section 13 of the 1960 Act relates to a *judgment of a Nigerian Court* which the judgment-creditor in Nigeria wants to obtain a certificate for, with the purpose of enforcing it in a foreign court that is recognised as a reciprocating or designated country under the 1960 Act. That certificate, however, would not be issued to the judgment-creditor where there is a *pending appeal* before a *Nigerian court*.

E. Limitation of Actions

Section 4(1) of the 1960 Act provides that, to have the judgment registered, the judgment-creditor may apply at any time within six years after the date of the judgment of the original court, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings. There is no provision for an extension of time.

VI. Conclusion

This chapter has discussed the statutory regime for registering foreign judgments in Nigeria. It was submitted in this chapter that, at the moment, the 1922 Ordinance is the extant law that solely applies in relation to the registration of foreign judgments in Nigeria. Part 1 of the 1960 Act can only apply when an order of the Minister of Justice is made. Thus, the Nigerian appellate decisions that held to the contrary were reached *per incuriam*. It was also submitted that there is a common law regime that applies where the 1922 Ordinance is inapplicable.

The statutory framework, both under the 1922 Ordinance and the 1960 Act, for registering foreign judgments in Nigeria was criticised in this work, and suggestions for reforms were also made. Such criticisms included the Nigerian statutory

[281] (2013) 14 NWLR 284. See particularly the judgment of Peter-Odili JSC at 334–45.

foreign regime 'paying loyalty to Nigeria's colonial past', problems with reciprocity as a basis for recognising foreign judgments, restricting enforcement to fixed foreign money judgments, restricting the enforcement regime to judgments from foreign superior courts, exclusivity provisions in the 1960 Act, powers to make judgments unenforceable by the executive under the 1960 Act, uncertainty on the jurisdiction to enforce foreign judgments, and mandatory foreign judgment currency provisions under the 1960 Act.

The discussion on foreign judgment provisions under the 1922 Ordinance included registering foreign judgments, the refusal to register and setting aside the registration of foreign judgments, original versus registering courts, foreign currency judgments, and limitation of actions.

The foreign judgment provisions under the 1960 Ordinance were discussed. This included a discussion on registering foreign judgments, the refusal to register and, setting aside the registration of, foreign judgments, *res judicata*, original versus registering courts, pending appeals, and limitation of actions.

19

Recognition and Enforcement of Foreign Arbitration Awards

I. Introduction

There are two principal regimes for enforcing foreign arbitration awards in Nigeria, namely, the common law and statutory regimes. The statutory regime is contained mainly in the Arbitration and Conciliation Act (the 'ACA')[1] (which also incorporates the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards – 'the New York Convention'), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention'),[2] and the Reciprocal Enforcement of Judgments Act (the '1922 Act').[3]

In this chapter, we will discuss the common law regime in Nigeria. Nigeria's statutory regimes will be discussed in a subsequent chapter. Also discussed are arbitration awards in foreign currency and limitation of action in enforcing arbitration awards.

II. Common Law Regime

A foreign arbitration award may be enforced by a common law action in the same way a foreign judgment may be enforced, even in the absence of a treaty or legislation guaranteeing reciprocal treatment of awards.[4] In *Edokpolor v Alfred C Toepfer*,[5] the plaintiff obtained an award against the defendant at the Rubber Trade Association of New York Incorporated's Board of Arbitrators and sought to have the award recognised and enforced in an action in the High Court of the then

[1] Cap 18 LFN 2004. Originally Decree No 11 of 1988, entered into force 14 March 1988. There are other State arbitration laws modelled after the Federal law, but this work does not discuss them.

[2] International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree 1967.

[3] Cap 175 LFN 1958. See also the Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 ('1960 Act'), Cap F35 LFN 2010), which is not yet applicable. The 1960 Act is not [yet] applicable until an order is made by the Attorney General of the Federation designating countries to which it should apply. See generally *Macaulay v RZB of Austria* (2003) 18 NWLR 282.

[4] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89.

[5] (1965) NCLR 89.

Mid-Western Region of Nigeria.[6] The High Court dismissed the plaintiff's claim, *inter alia*, on the ground that Nigeria and New York did not have a treaty, at the material time, that guaranteed the reciprocal treatment of awards. The Supreme Court allowed the appeal. Bairamian JSC, speaking for the Supreme Court of Nigeria, held as follows:

> we cannot see why a suit brought upon a foreign award ought to be struck out merely on the ground that there must be a treaty guaranteeing reciprocal treatment in the country where it was made or an order-in-council to that effect, when that ground only is not sufficient for striking out a suit brought upon a foreign judgment. We must conclude that the learned judge erred in striking out the action upon that view but ought to have refused the defendant's application.[7]

A party does not need to commence a fresh action in Nigeria on the original or underlying cause of action. An arbitration award is enforceable at common law upon proof that the award was made pursuant to the provisions of an arbitration agreement, in an arbitration conducted in accordance with the agreement, and provided that the award is both final and in accordance with the law of the place where the arbitration was carried out and where the award was granted.[8]

For a foreign arbitral award to be enforceable at common law, the parties must submit to arbitration, the issues arbitrated must be within the scope of the arbitration agreement, and the award should be final and conclusive. Submission to arbitration could take the form of either an express written agreement to submit to arbitration or an oral agreement.[9]

It remains unsettled what defences are available in an action to enforce a foreign arbitral award at common law. It is likely that, given the international acceptance of the New York Convention, Nigerian courts will consider the defences provided in the Convention[10] in actions to enforce foreign arbitration awards at common law.

The common law regime for enforcing foreign arbitration awards co-exists with other regimes that are discussed below. This raises a question as to the relationship between them. It is submitted that the common law regime only applies to awards falling outside the scope of the regimes discussed below. However, where an award falls within the scope of any of these regimes, it should be enforced under that regime and not at common law. Unlike in other jurisdictions, there is no statute in Nigeria that expressly confers or preserves the right to enforce the New York Convention using common law, or for the party in whose favour the award

[6] It is comprised of what are now Edo and Delta States in Nigeria.

[7] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 96.

[8] *Murmansk State Steamship Line v Kano Oil Millers Ltd* 1974 (3) ALR Comm 192, 197 (the decision was reversed in *Murmansk State SS Line v Kano Oil Millers Ltd* (1974) NCLR 1, but the court did not overrule this aspect).

[9] *Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89, 95.

[10] Article V of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958 – 'the New York Convention'.

was granted to avail itself of other remedies under Nigerian law, other than the enforcement of the award. In general, as will be demonstrated below, the New York Convention and the ICSID Convention offer better protection for awards than the common law regime.

The common law regime is better suited for enforcing awards from countries that are not parties to the New York Convention. The common law regime complements the other regimes – it should not be used as a substitute to supplant them.

III. Statutory Regime

The statutory regime for enforcing foreign awards is contained mainly in the ACA, the New York Convention, the ICSID Convention, and the 1922 Act. They are discussed below.

A. Arbitration and Conciliation Act

International arbitral awards can be enforced in Nigeria under the ACA. The UNCITRAL Model Law on International Commercial Arbitration 1985 (the 'Model Law') heavily influenced the drafting of the ACA.

Arbitration is treated as international under the ACA on one of four grounds: first, where the parties to an arbitration agreement have their places of business in different countries at the time the agreement was executed;[11] second, when one of the following places is situated outside the country where the parties have their places of business: (i) the place of arbitration, if such a place is determined in, or pursuant to, the arbitration agreement,[12] (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed, or (iii) the place with which the subject matter of the dispute is most closely connected;[13] third, where the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country;[14] and fourth, where the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction will be treated as an international arbitration.[15]

The enforcement of foreign arbitral awards in Nigeria is governed by the *lex fori*.[16] Thus, Section 51(1) of the ACA provides that a foreign arbitral award will,

[11] Arbitration and Conciliation Act 1990 s 57(2)(a). Section 57(3) provides that, for the purposes of Section 57(2), if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference shall be made to their habitual residence.

[12] Arbitration and Conciliation Act Cap 18 LFN 2004, s 57(2)(b)(i).

[13] ibid, s 57(2)(b)(ii).

[14] ibid, s 57(2)(c).

[15] ibid, s 57(2)(d).

[16] *Murmansk State Steamship Line v Kano Oil Millers Ltd* (1974) NCLR 1.

irrespective of the country in which it was made, be recognised as binding, subject to the provisions of the ACA, and will, upon application in writing to the court, be enforced by the court. There is no requirement that leave of the court must be obtained under the ACA in order for a party to seek to have a foreign arbitral award recognised and enforced.

This point is significant because it was once held that a person in whose favour an award has been made (the 'award creditor') is required to seek leave of the court in order to enforce an arbitration award in the same manner as a judgment, and that such a procedure was discretionary.[17] Thus, in an action to enforce a Russian award, the Nigerian Supreme Court observed that the failure of the award creditor to obtain leave of the judge or court before instituting an action to enforce the award rendered the action incompetent. It is submitted that this aspect of the judgment of the Supreme Court should not be used to construe the ACA, as the Supreme Court was dealing with a State arbitration law that required leave of court to enforce an arbitral award.[18]

Section 51(2) of the ACA provides that

> The party relying on an award or applying for its enforcement shall supply:
>
> (a) the duly authenticated original award or duly certified copy thereof;
> (b) the original arbitration agreement or a duly certified copy thereof; and
> (c) where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

In construing Section 51(2)(b) of the ACA, the issue before the Court of Appeal was whether the trial court, in a case where the applicant did not provide the original copy of the arbitration agreement, was right to have exercised its discretion to enforce the award (instead of striking out the application), subject to the production of the original copy of the award. The Court of Appeal held in the affirmative to the effect that:

> An applicant's failure to attach the original copy of an arbitration agreement to an application for enforcement of the arbitral award based on the agreement does not render the application incompetent. In this case, the trial court, instead of striking out the respondent's application, exercised its discretion to enforce the award subject to the production of the original copy of the award. In other words, what was granted was a conditional enforcement of the arbitral agreement. The trial court's ruling was made to protect the interest of the parties because an order striking out or dismissing the award would have been prejudicial to the respondents. In the circumstance, the Court of Appeal would not reverse the trial court's order.[19]

It is important to note that Section 51(2) of the ACA does not apply to the arbitration award foreign judgment provisions (discussed below). Thus, in relation to

[17] ibid.
[18] The statute in question was the Arbitration Law (Cap 7 of the Laws of Northern States). Section 13 of that law provides that 'An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect'.
[19] *Sundersons Ltd v Cruiser Shipping PTE Ltd* (2015) 17 NWLR 357, 373.

the arbitration award foreign judgment provisions, Section 106(h) of the Evidence Act[20] applies. This position is supported by *MV 'Delos' v Ocean Steamship (Nig) Ltd*,[21] where the Court of Appeal, *inter alia*, relied on Section 113(i) of the Evidence Act, Cap 112 LFN, 1990 (also *in pari materia* with Section 106(h) of the Evidence Act, 2011) in relation to proof of an arbitration award emanating from New York that was alleged to have been recognised in the New York court.

Where a Nigerian court recognises and enforces an award, it has no discretion to alter the award itself.[22] In *Tulip (Nigeria) Ltd v Noleggioe Transport Maritime SAS* ('*Tulip*'),[23] one of the grounds on which the defendant-appellant challenged the judgment of the Federal High Court was that it awarded interest at eight per cent, compounded at a quarterly rate until the award was satisfied. The defendant-appellant contended that this was contrary to the method of calculating post-judgment interest under Order 42 rule 7 of the Federal High Court Rules 2000, which allows for only simple interest not exceeding 10 per cent per annum on judgment debts. In addition, the defendant-appellant contended that the Federal High Court had no jurisdiction to award compound interest but had jurisdiction to award simple interest. The Court of Appeal rejected this submission on the basis that:

> [w]hat the learned trial judge recognised and ordered to be enforced was an arbitral award not a judgment. The Appellant should have pursued in England by way of an appeal against the arbitral award but failed to do so. The award is binding on the parties and since the arbitral award is not fraudulently procured and it is not against public policy the court is bound to give effect to such award.[24]

An arbitral award shall, irrespective of the country in which it was granted, be recognised as binding and shall, upon application in writing to the court, be enforced by the court.[25] In this connection, it has been held that: 'a foreign award remains binding, without any requirement of registration and even before an application in writing for enforcement is made to the court';[26] and 'an arbitral award obtained anywhere in the world can be registered and recognized by any court in Nigeria without recourse to a foreign court to first adopt same as its judgment.'[27]

Any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award.[28] In other words, the party requesting that a court refuse to recognise and enforce an award need not be the award

[20] Evidence Act, 2011.
[21] (2004) 17 NWLR 88.
[22] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 286–87.
[23] (2011) 4 NWLR 254.
[24] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 287.
[25] Arbitration and Conciliation Act Cap 18 LFN 2004, s 51(1).
[26] *Ogbuneke Sons and Company Limited v ED & F Man Nigeria Limited* (2010) LPELR-4688(CA) 9–10 (Owoade JCA).
[27] *Calais Shipholding Co v Browen Energy Trading Ltd* (2015) All FWLR 1765, 1784 (Oseji JCA). See also *Ogbuneke Sons and Company Limited v ED & F Man Nigeria Limited* (2010) LPELR-4688(CA).
[28] Arbitration and Conciliation Act Cap 18 LFN 2004, s 52(1).

debtor; indeed, such a party need not have been a party to the arbitral proceedings. The court may refuse recognition and enforcement of the award on grounds taken verbatim from Article V of the New York Convention.[29]

Section 52(2) provides for the following grounds upon which a Nigerian court may refuse to recognise and enforce an arbitral award:

(a) if the party against whom it is invoked furnishes the court proof-
   (i) that a party to the arbitration agreement was under some incapacity, or
   (ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made, or
   (iii) that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or
   (iv) that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
   (v) that the award contains decisions on matters which are beyond the scope of submission to arbitration, so however that if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on maters submitted to arbitration may be recognised and enforced, or
   (vi) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties, or
   (vii) where there is no agreement within the parties under sub-paragraph, that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or
   (viii) that the award has not yet become binding on the parties or has been set aside or suspended by a court in which, or under the law of which, the award was made; or
(b) if the court finds–
   (i) that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or
   (ii) that the recognition or enforcement of the award is against public policy of Nigeria.

In interpreting Section 52(2)(a)(iii), it has been held that arbitration proceedings, like any proceeding of a tribunal, should observe the rules of natural justice, fair hearings, and adherence to the principle of *audi alteram partem*. However, where a respondent has been served with proper notice of arbitration proceedings, and in good time, and the respondent should have taken steps to present his or her defence but failed to do so, the respondent cannot invoke a lack of proper notice as a defence.[30]

[29] ibid, ss 48 and 52(2).
[30] *Michado & Co Inc v Modak (Nig) Enterprises Ltd* (2002) 12 WRN 49.

B. New York Convention

Nigeria is currently a party to the New York Convention, and therefore a foreign arbitration award is now enforceable in Nigeria.[31] Given that Nigeria is a dualist country, it required legislation to enact the New York Convention; without any legislation incorporating the New York Convention, Nigeria's addition as a Contracting State to the New York Convention would have had no effect within the Nigerian legal system.[32] The New York Convention is incorporated by the ACA, which addresses matters of recognition and enforcement of foreign arbitral awards.

Nigeria made its ratification of the New York Convention conditional on the New York Convention applying only to the recognition and enforcement of awards made in the territory of another [reciprocating] Contracting State.[33] Nigeria added another condition that it would apply the New York Convention only to differences arising from legal relationships, contractual or otherwise, that are considered commercial under national laws.[34]

Under Article V of the New York Convention, refusing to recognise and enforce an award should be at the 'request of the party against whom [the award] is invoked'. However, under Section 52(2)(a) of the ACA, any of the parties to an arbitration may request the court to refuse recognition or enforcement of the award in Nigeria.

C. ICSID Convention

Nigeria is a party to the ICSID Convention. The ICSID Convention enjoins each Contracting State to take such legislative or other measures as might be necessary for making provisions of the ICSID Convention effective in its territories,[35] and Nigeria has enacted legislation to implement it.[36]

The ICSID Convention has a unique regime for enforcing awards made under it.[37] Nigerian courts are prevented from modifying or setting aside an ICSID award.[38] In other words, there can be no external review of an ICSID award. The ICSID Convention has its own self-contained procedures for reviewing awards. A party to an ICSID award cannot initiate an action in the Nigerian court to set aside or review the award: the Nigerian court must dismiss such an action. This distinct

[31] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 283.
[32] *Gani Fawehinmi v Abacha* (2000) 6 NWLR (Pt. 660) 228.
[33] Second Schedule to the Arbitration and Conciliation Act; New York Convention, Art 1.
[34] ibid, Art 1(3).
[35] ICSID Convention, Art 69.
[36] International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree 1967.
[37] ICSID Convention, Arts 53–55.
[38] ibid, Art 53.

feature of the ICSID Convention is important for the finality of ICSID awards. It provides a clear advantage over other international arbitration conventions or forums.

The International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree 1967 does not contain a provision which allows the Nigerian court enforcing an ICSID award to refuse its enforcement on any grounds. Consistent with the provisions of the ICSID Convention, what is provided is that the enforcing court should stay the enforcement proceedings for the parties to return to the ICSID and settle their differences as regards to the award.

To date, there has been no reported case dealing with the enforcement of an ICSID award in the Nigerian courts.

D. Foreign Judgments (Reciprocal Enforcement) Act

In Nigeria, the statutory regime for enforcing foreign judgments can be used to enforce foreign arbitration awards. Such awards are treated as foreign judgments. Section 2 of the 1922 Act provides that 'the award must have, under the laws in force in the country where it was granted, become enforceable in the same manner as a judgment given by a court of that country' (hereinafter the 'arbitration award foreign judgment provisions').[39] Under the arbitration award foreign judgment provisions, the award creditor applies for *registration* [under the 1922 Act], rather than the *recognition* and *enforcement* envisaged under the ACA and New York Convention.[40]

In *Tulip*,[41] the Court of Appeal interpreted the arbitration award foreign judgment provisions to the effect that an arbitration award made in a foreign country [to which the 1922 Act applies] can only be elevated to the status of a judgment if the party in whose favour the award is made had applied before the foreign court for leave to enforce the arbitral award in the same manner as a judgment. Once the foreign court grants such an order, it then becomes the judgment of the foreign court. It is only then that the 1922 Act applies. In *Tulip*,[42] the plaintiff-respondent, by originating summons, sought leave of the Federal High Court to recognise and enforce an arbitral award made in England. The plaintiff-respondent had not applied to convert the award into a foreign judgment in the English High Court. The defendant-appellant responded by filing a preliminary objection on the ground that the action was statute-barred under Section 3(1) of the 1922 Act, which requires registration of the foreign judgment within one year. The Court of Appeal, in upholding the decision of the trial court, held that having regard to the fact that the arbitral award had not become enforceable as a judgment of the

[39] See also Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 s 2.
[40] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 278–79.
[41] ibid.
[42] ibid.

English High Court, the provisions of the 1922 Act were not applicable to this case. Indeed, it is correct to state that if the award creditor has already obtained a judgment recognising the award in the country where it was granted, only then could that judgment be enforced as such – under common law or the statutory regime as a foreign judgment.

It is also submitted that, from the decision of the Court of Appeal in *Tulip*,[43] the proper way a Nigerian court applies Section 2 of the 1922 Act is to determine whether an award is *enforceable* in the same manner as a judgment given by a foreign court *in pursuance of the law in force in the place where the award was made*. The significance of this point is that resorting to the proof of foreign law is inevitable, except the judgment debtor does not challenge (or admits) the position that the foreign award is enforceable in the same manner as a judgment of a foreign court in pursuance of the law in the place where the award was made. Thus, in *Tulip*, the Court of Appeal, in order to determine whether the arbitral award of the United Kingdom Tribunal was capable of being enforced under the 1922 Act, had to make reference to Section 66(1) of the United Kingdom Arbitration Act, which provides that 'an award by the Tribunal pursuant to an Arbitration agreement may by leave of the court be enforced in the same manner as a judgment or order of the court to the same effect'. The Court of Appeal, in applying Section 66(1) to the facts of the case, held that there was no evidence to show that the respondent did obtain such leave, which implied that the condition precedent was not satisfied for bringing Section 2 of the 1922 Act, relating to the arbitration award foreign judgment provisions, into operation.

The implication of the decision in *Tulip* is that if, under the law in force where the award has been made, there has been no application for leave to recognise the award so as to elevate it to the status of a court judgment, but the applicable law in force in the country where the arbitration award is made treats such an award as *enforceable* without any formal process, then such an award could be enforced under the 1922 Act. Indeed, the Malawian courts, in interpreting an equivalent provision, held that it is enough if the award has reached the stage where it can be enforced by the courts in the country which granted it. It is not necessary for the registration of an award that the award creditor should have instituted proceedings to enforce it in the country where it was granted, or to have obtained a judgment in the country enforcing the award.[44]

The arbitration award foreign judgment provisions pre-date the New York Convention. It appears to have been instituted to create a regime for enforcing arbitration awards akin to that which enforced foreign judgments within the British colonial empire. Even though, in many respects, arbitration awards sit uncomfortably in the statutes drafted with 'foreign judgments' in mind, as Patchett

[43] ibid.

[44] *Bauman Hinde v David Whitehead*, MSCA Civil Appeal No 17 of 1998 (Supreme Court, Malawi, 2000).

has observed, 'there seems to be little doubt that the criteria in the statutes must be fulfilled *mutatis mutandis* in respect of the award before registration can be finalized'.[45] In other words, an application to register a foreign arbitration award is treated as an application to enforce a foreign judgment.

The arbitration award foreign judgment provisions in Nigeria co-exist with the common law regime and New York Convention regime. Under the 1922 Act, it is possible for the award creditor to bring an action on the award at common law rather than seeking to register it under the 1922 Act.[46] In other words, even though an award qualifies for registration as a foreign judgment in Nigeria, the award creditor may choose to bring a common law action on the award. However, the disadvantage of commencing a common law action on an award which could have been registered is that the claimant will not receive the costs of that action unless the claimant has already failed in an application to register the award, or unless the court decides otherwise.[47]

The arbitration award foreign judgment provisions developed at a time when there was no international regime for enforcing foreign arbitration awards. The regime was deemed relevant to the British colonial empire – it facilitated the enforcement of awards in the colonies. With the adoption and worldwide acceptance of the New York Convention and the demise of the British colonial empire, it is recommended that Nigeria should repeal the provisions, as they have outlived their usefulness. Applying the statutory regime for enforcing foreign judgments to the enforcement of foreign arbitration awards could, in some instances, amount to a breach of Nigeria's international obligations.[48] It is recommended that the regime established by the arbitration award foreign judgment provisions in Nigeria should be restricted to awards from countries that are not parties to the New York Convention or countries for which no reciprocity exists under the New York Convention.

IV. Arbitration Awards in Foreign Currency

A foreign arbitration award will often be in foreign currency. As with foreign judgments, two important issues are: the currency in which foreign awards should be enforced; and, if there is need for conversion, which date should be used. In regard to the regime governed by the ACA and the New York Convention, it is submitted that the common law regime for the enforcement of judgments in foreign currency should be applicable. In Nigeria, under the common law regime, judgments could be given in foreign currency, but it is unclear whether conversion

[45] KW Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (London, Butterworths, 1984) 210.

[46] Reciprocal Enforcement of Judgments Act s 3(4).

[47] ibid, s 4.

[48] See generally *Gani Fawehinmi v Abacha* (2000) 6 NWLR (Pt. 660) 228.

to Naira is mandatory or discretionary [at the discretion of the award creditor] due to inconsistent judicial opinions by Nigerian appellate judges. What is clear is that where conversion to Naira is mandatory, the relevant time of conversion is the execution date of the judgment at the official conversion rate stipulated by the Central Bank of Nigeria.

Where foreign currency is awarded under the arbitration award foreign judgment provisions, the common law regime could apply under the 1922 Act, as there is no provision relating to foreign currency. In the event the 1960 Act becomes applicable, it will be mandatory to convert the foreign currency to Naira.[49]

V. Limitation of Actions and Arbitration Awards

In Nigeria, a six-year period is generally adopted in each State of the Federation with a statute dealing with issues of limitation of actions. We suggest that it would be more appropriate for the issue of limitation of actions to be addressed in the statutes dealing with the enforcement of arbitration awards.

Where the arbitration award foreign judgment provisions apply, the applicable limitation period is 12 months, as stipulated under the 1922 Act.[50] Where the arbitration award foreign judgment provisions are inapplicable, the limitation period is usually six years in each State of the Federation. Thus, in *Tulip*,[51] the Court held that the institution of an action in Nigeria to enforce an award from a London Arbitral Tribunal approximately four years after the cause of action arose did not make the plaintiff-respondent's action statute-barred because the arbitration award foreign judgment provisions were inapplicable to the facts of the case; the action was instituted within the six-year limitation period provided for under Section 8(1)(d) of the Limitation Law of Lagos State.

It has been held that the limitation law of each State has territorial effect irrespective of the parties or the court (ie Federal High Court or State High Court) where the action has been instituted in. Therefore, where an action was instituted in the Federal High Court, Lagos for the recognition and enforcement of a United Kingdom arbitral award, the law of Lagos, which is the *lex fori*, was applicable.[52]

Where the issue of limitation of action arises, the point when time begins to run becomes a relevant question. In the absence of a *Scott v Avery* clause,[53]

[49] Foreign Judgments (Reciprocal Enforcement) Act No 31 of 1960 s 4(3).

[50] In the event the 1960 Act becomes applicable, the limitation period would be six years.

[51] (2011) 4 NWLR 254.

[52] *Tulip (Nig) Ltd v Noleggioe Transport Maritime SAS* (2011) 4 NWLR 254, 284. See also *Etim v Inspector General of Police* (2001) 11 NWLR (Pt. 724) 266, 276, 284.

[53] The *Scott v Avery* clause takes two forms: (i) An express or implied term of the contract that no action shall be brought until arbitration has been conducted and an award made; and (ii) A provision that the only obligation of the defendant shall be to pay such sum as the arbitrator shall award. See *African Insurance Development Corporation v Nigeria Liquified Natural Gas Limited* (2000) 4 NWLR 494, 505 (Ayoola JSC).

time begins to run when the underlying cause of action arises, rather than when the arbitration award was made. In *Murmansk State Steamship Line v Kano Oil Millers Ltd*,[54] the plaintiff-appellant, in 1964, entered into a charter-party agreement with the defendant-respondent for the shipment of goods to Apapa, Lagos. A dispute subsequently arose between the parties sometime in 1964, whereupon the dispute was referred to arbitration in Moscow, Russia. An award was made in favour of the plaintiff-appellant. The plaintiff then brought an action before the Kano High Court for the enforcement of the award against the defendant. The Kano High Court dismissed the action of the plaintiff on the ground that it was statute-barred.

On further appeal, the Supreme Court of Nigeria held that, if the plaintiff expressly waives its right to sue as soon as the cause of action arises, as in agreeing that arbitration or an award shall be a condition precedent to any action, the limitation period runs from the date of the award, unless the defendant, for its part, waives its right to insist on the condition precedent. The Supreme Court (in agreement with counsel for the defendant-respondent) further advised that the plaintiff, in this situation, would have been better off commencing an action as soon as the breach of contract occurred and then asking the court to stay the proceedings under common law until the arbitration proceeding is disposed of. This recommendation of the Nigerian Supreme Court now has support under Sections 4 and 5 of the ACA, under which Nigerian courts are empowered to stay proceedings in breach of an arbitration agreement.

In *City Engineering (Nig) Ltd v Federal Housing Authority*,[55] Ogundare JSC also observed that:

> a distinction must be drawn between an action to enforce an arbitral award – this is provided for in the arbitration law itself, and the relief that can be granted in such an action is an order enforcing the award as if it were a judgment of the court. And an action for damages for breach of an implied promise to perform a valid award where it is open to the court to order damages for failure to perform the award or decree, in appropriate cases, specific performance of the award or grant an injunction restraining the losing party from disobeying the award or grant a declaratory relief … the statutory period of limitation in respect of the former form of action runs from the breach that gave rise to the arbitration … In respect of the latter category of action, limitation period runs from the date the losing party refuses to obey the arbitral award. In either case, the date of the award does not apply.[56]

It should be noted that there are statutory provisions that are capable of limiting the effect of a *Scott v Avery* clause. For example, Section 63 of the Limitation Law of Lagos provides that:

> Notwithstanding any term in a submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award

[54] (1974) NCLR 1.
[55] (1997) 9 NWLR 224.
[56] *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR 224, 245.

> is made under the submission, the cause of action shall, for the purposes of this law and any other limitation enactment (whether in their application to arbitrations or other proceedings) be deemed to have accrued in respect of any such matter at the time when it would have accrued but for the term in the submission.

The Supreme Court of Nigeria has construed the above provision to the effect that the *Scott v Avery* clause is inapplicable under Lagos State law so that a cause of action to enforce an arbitral award (irrespective of a *Scott v Avery* clause) shall not be brought after the expiration of six years from the date on which the cause of action accrued, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration Law.[57] The provisions of Section 63 of the Limitation law of Lagos State appear to be founded on the view that an action to enforce an arbitration award is 'really one on the contract'. The action to enforce the award is not an independent cause of action for which time runs from a date other than the date of original breach of contract, subject to arbitration. The practical significance of this is that if enforcement of an award is sought in the States of Nigeria that have laws similar to Section 63 of the Limitation Law of Lagos State, a party to a *Scott v Avery* clause is better off disregarding the need to arbitrate as a condition precedent to litigation and suing immediately if there is a breach. This is because time starts to run from the date of the breach and not the date arbitration starts or when the award is granted. In this respect, such statutes appear to encourage breach of arbitration agreements.

On the other hand, a party is better off initiating the arbitration process immediately after a breach occurs and perhaps ensuring that the process does not drag for too long – in any case, one of the virtues of arbitration is to ensure an expedited means of settling disputes. Delay in initiating and concluding arbitration proceedings could lead to a situation where the resulting arbitration award is unenforceable. Arguably, this is inconsistent with common sense and justice – a party to arbitration proceedings does not have sole control over their duration. To provide a party with the 'incentive' to delay proceedings by allowing them to rely on a delay to escape the enforcement of a resulting award is most inappropriate. The approach is also inconsistent with how foreign judgments are treated – an action to enforce a foreign judgment is an action on the judgment and not an action on the original cause of action. Admittedly, the juridical bases of a foreign judgment and a foreign arbitration award are different. The former is founded on the jurisdiction of the foreign court, while the latter is founded on the consent of parties to the proceedings.

[57] See s 8(1)(d) of the Limitation Law of Lagos State; *City Engineering (Nig) Ltd v Federal Housing Authority* (1997) 9 NWLR 224, 245–46 (Ogundare JSC); 247–48 (Uwais CJN); 248 (Belgore JSC as he then was); 249 (Wali JSC); 249–50 (Kutgi JSC); 250–2 (Ogwegbu JSC); 252–54 (Onu JSC).

VI. Conclusion

This chapter has discussed the common law and statutory regimes for enforcing foreign judgments in Nigeria. It is observed that the statutory regimes offer better protection when compared with the common law regime. The extent to which the common law regime interacts with the statutory regimes in the enforcement of foreign judgments is not quite certain. Other issues that were discussed include the arbitration award foreign judgment provisions (which were criticised as currently unsatisfactory), the formal requirements for proving an arbitral award, arbitration awards in foreign currency and limitation of actions.

PART VII

International Civil Procedure

20

Remedies Affecting Foreign Judicial and Arbitral Proceedings

I. Introduction

Cross-border litigation and arbitration has the potential to create problems of parallel proceedings. While litigating or arbitrating in Nigeria, a party may want an injunction to restrain another party from litigating or arbitrating in a foreign forum. A party may want an order from the Nigerian forum which will freeze the assets of the defendant within, or even outside, the jurisdiction of the Nigerian forum. A party may claim damages in breach of an agreement to litigate or arbitrate in the Nigerian forum. A party may want to obtain relief from the Nigerian forum in support of proceedings in a foreign forum. Issues relating to remedies in support of, or against, foreign judicial and arbitral proceedings are critical for ensuring the effective administration of justice, legal certainty and predictability, and for enhancing the effectiveness of commercial transactions. This chapter examines some of these issues.

II. Anti-Suit Injunction

An anti-suit injunction is an order by a court compelling a party not to commence or continue proceedings in a foreign court. Nigerian courts can grant anti-suit injunctions in appropriate cases.[1] The grant of an anti-suit injunction is discretionary, and the discretion is generally to be exercised reluctantly, sparingly, and with great circumspection. In other words, an anti-suit injunction is generally granted where a party establishes grave and special circumstances.[2]

An anti-suit injunction, if utilised effectively, can help prevent or reduce parallel litigation and conflicting judgments, and also can reduce litigation and transaction costs. On the other hand, an anti-suit injunction, though directed at a

[1] See generally *United Bank of Africa Plc v Coker* (1996) 4 NWLR 239; *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606, 637 (Galadima JCA).

[2] *United Bank of Africa Plc v Coker* (1996) 4 NWLR 239, 251–52 (Pats-Acholonu JCA, as he then was).

party, has the effect of indirectly interfering with proceedings in a foreign court[3] and violating the principles of international comity[4] on the basis that disobedience to an anti-suit injunction can attract penal consequences from the Nigerian court. Also, a Nigerian court can refuse to enforce a judgment obtained in breach of an anti-suit injunction.[5] This explains why Nigerian courts only grant the remedy of an anti-suit injunction in truly exceptional circumstances.

Generally, the principles that apply in the grant of an injunction also apply to the grant of an anti-suit injunction. The principle on the grant of injunctions was ably summed up by Obaseki-Adejumo JCA:

> Meanwhile, there are certain conditions that must be satisfied by an applicant with respect to the injunction being sought has been established in a number of cases. See *Obeya Memorial Hospital v. A.G., Federation*;[6] *Akapo v Hakeem-Habeeb & Ors*[7] *Yalaju Amaye v A.E.R.C. Ltd.*[8] *Shitu Akinpelu v. Ebunola Adegbore & Ors.*[9] Some of these conditions are: (a) the applicant must show that there is a serious question to be tried i.e. that the applicant has a real possibility of success at trial, notwithstanding the defendant's technical defence (if any); (b) the applicant must show that the balance of convenience is on his side, that is, more justice will result in granting the application than refusing it; (c) that the applicant must show that damages cannot be an adequate compensation for his damage or injury if he succeeds at the end of the day; applicant must show that his conduct is not reprehensible for example that he is not guilty of any delay; (e) No order for an interlocutory injunction should be made on notice unless the applicant gives a satisfactory undertaking as to damages save in recognized exceptions.[10]

The Court of Appeal considered the grant of an anti-suit injunction in *United Bank of Africa Plc v Coker* ('*Coker*').[11] In that case, the plaintiff-respondent was a manager in charge of the defendant-appellant's company in New York. The defendant-appellant employed a firm of auditors to investigate the operations of the New York branch. The auditors made adverse findings against the plaintiff-respondent. These adverse findings subsequently led to the plaintiff-respondent's resignation. The defendant-appellant also dismissed the plaintiff-respondent from service for failing to respond to the auditors' adverse findings.

[3] See ibid, 251 (Pats-Acholonu JCA).

[4] See for instance *British Airways Board v Laker Airways Ltd* [1984] UKHL 7, where there was a battle of anti-suit injunctions between the courts in England and the US until it was finally put to a halt by the House of Lords, which held that the English court should not have granted the anti-suit injunction in the first place.

[5] *International Finance Corporation v DSNL Offshore Ltd* (2008) 9 NWLR 606, 637 (Galadima JCA).

[6] (1987) 2 NSCC 961; (1987) 3 NWLR (Pt. 60) 325.

[7] (1992) 2 NSCC 313; (1992) 6 NWLR (Pt. 249) 266.

[8] (1990) 6 SC 157; (1990) 4 NWLR (Pt. 145) 422.

[9] (2008) LPELR 354 (SC) 25; (2008) 10 NWLR (Pt. 1096) 531.

[10] *The Shell Petroleum Development Company Nigeria Ltd v Crestar Integrated Natural Resources Ltd* (2016) 9 NWLR 300, 333.

[11] (1996) 4 NWLR 239.

The plaintiff-respondent claimed against the defendant-appellant at the Lagos High Court for unlawful and unfair dismissal as well as defamation. Several months later, the defendant-appellant also commenced civil proceedings against the plaintiff-respondent in New York and claimed the sum of US$5,297,911.01 arising from the manner in which the plaintiff-respondent had allegedly fraudulently run the defendant-appellant's company in New York. The Lagos State High Court issued an interlocutory anti-suit injunction restraining the defendant-appellant from continuing the proceedings in New York, pending the determination of the proceedings in the Lagos High Court. The Court of Appeal unanimously allowed the defendant-appellant's appeal.

The Court of Appeal did not consider the instant case as an appropriate situation where the Nigerian court could exceptionally grant the remedy of an anti-suit injunction. In addition, the Court of Appeal also attached considerable significance to considerations of comity (in view of the proceedings in the New York court), and the fact that the proceedings in New York were of a different nature.[12] In this regard, the Court of Appeal held that it would not be prejudiced by considerations of patriotism (such as the nationality of the plaintiff-respondent) to grant an anti-suit injunction.[13] On appeal, the finding of the Court of Appeal (on the issue of anti-suit injunction) was not disturbed by the Supreme Court.[14]

Nevertheless, the Court of Appeal in *Coker* did not provide any further guidance on the exceptional circumstances under which the Nigerian courts may grant an anti-suit injunction. It is submitted that the presence of a choice of forum agreement to litigate or arbitrate in Nigeria should constitute exceptional (though not decisive) circumstances where a Nigerian court may grant an anti-suit injunction.[15] Nigerian courts are prepared to stay an action brought in breach of a choice of forum agreement, unless the party who is in breach of it shows strong cause.[16] This provides a strong rationale that should encourage Nigerian courts to protect the interest of the Nigerian forum by granting an anti-suit injunction against foreign actions that are in breach of an agreement to litigate or arbitrate in the Nigerian forum. Other exceptional circumstances include where the foreign action is vexatious and oppressive, unconscionable, unjust, or instituted in bad faith.

In the absence of a choice of forum agreement designating the Nigerian forum, the Nigerian courts should also be willing to grant an anti-suit injunction in situations (though not decisive) where it has a manifestly strong interest, such as being manifestly or obviously the natural forum to resolve the dispute. Situations where the Nigerian forum has a manifestly strong interest would constitute truly

[12] *United Bank for Africa Plc v Coker* (1996) 4 NWLR 239, 251 (Pats-Acholonu JCA, as he then was).
[13] ibid, 251 (Pats-Acholonu JCA, as he then was).
[14] *Coker v United Bank for Africa Plc* (1997) All NLR 34.
[15] *Donohue v Armco Inc* [2001] UKHL 64, [23]–[27]; *AES Ust-Kamenogorsk Hydropower Plant JSC v Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [24]–[27] (Lord Mance).
[16] See generally *Nika Fishing Company Limited v Lavina Corporation* (2008) 16 NWLR 509, 535 (Mohammed JSC, as he then was).

exceptional circumstances. For example, where the Nigerian court is manifestly the natural forum for instituting an action, and the institution of an action in another forum would result in manifest injustice, the Nigerian court might, in its discretion, grant an anti-suit injunction. In *Coker*, the Nigerian court, on the facts of the case, was not manifestly the natural forum to resolve the dispute between the parties; it was the New York court that was the natural forum, having regard to the fact that the factual connections in the case were greatly concentrated in New York.

It is open to question whether a Nigerian court can grant an anti-suit injunction in an inter-State matter. Such remedies are granted in inter-State matters in the United States.[17] However, we submit that it should not be granted in the inter-State context because it is against the spirit of the Nigerian Constitution, which allows each court to determine its own jurisdiction. An anti-suit injunction in the inter-State context also interferes with right of the parties to access a competent Nigerian court.[18]

It is also open to question whether an arbitral tribunal seated in Nigeria can grant an anti-suit injunction. Section 13 of the Arbitration and Conciliation Act (the 'ACA') provides that except where the parties provide otherwise in their agreement, the arbitral tribunal may, at the request of a party, order any party to take such *interim measures of protection* as the arbitral tribunal may consider necessary, and require any party to provide appropriate security in connection with any measure taken. The ACA does not define the 'interim measure' that the arbitral tribunal could take. It is submitted that this might include the issue of an anti-suit injunction against a party in breach of an arbitration agreement to restrain or prevent them from instituting proceedings in a foreign forum. It is, however, unclear as to what extent the Nigerian court can support arbitral proceedings under Section 13 of the ACA, since an arbitral tribunal under the ACA is not conferred with powers to sanction disobedience of its orders. For example, can the Nigerian court enforce an anti-suit injunction order by the arbitral tribunal against a party that institutes proceedings abroad? It might be argued that the Nigerian court can enforce such interim measures pursuant to Section 13 of the ACA. Indeed, Sections 51 and 52 of the ACA, which provide conditions for the recognition and enforcement of an arbitral award, do not exclude interim measures from its scope.[19] In this regard, a legislative amendment that expressly provides the extent to which Nigerian courts can support arbitral proceedings, such as arbitral tribunals granting anti-suit injunctions, is recommended.[20]

[17] SI Strong, 'Anti-suit Injunctions in Judicial and Arbitral Procedures in the United States' (2018) 66 *American Journal of Comparative Law* 153.

[18] See s 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999.

[19] *Cf Nigerian AGIP Exploration Ltd v Nigerian National Petroleum Corporation* & *Oando Oil 124 & 135 Ltd* (CA/A/628/2011).

[20] *Cf* Sections 42 to 45 of the Arbitration Act 1996 of the United Kingdom, which clearly and expressly recognises the powers of courts in the UK to enforce interim measures of an arbitral tribunal.

As an alternative to an anti-suit injunction, a party could seek damages from the Nigerian court against a defendant who has brought an action abroad in breach of a jurisdiction agreement. Put differently, where the parties, as a term of their contract, agree to litigate in Nigeria, the Nigerian court can award damages against the party in breach of the agreement.[21] At present, however, there is no Nigerian case that has examined this issue.

There are several important reasons why a Nigerian court may award damages where a jurisdiction agreement is breached. Damages provide a malleable remedy. Stays of proceedings and anti-suit injunctions are relatively inflexible as general 'all or nothing' approaches to deciding the forum for litigation. Conversely, damages allow courts to provide monetary compensation for a breach of jurisdiction agreement. There are many kinds of loss that, subject to the law on the remoteness of damages, may be compensated with damages, and the quantum of an award can be varied to suit the circumstances of a given case. In this way, damages may provide a customisable solution that better reflects the needs of the parties and the terms of their jurisdiction agreement. Also, by awarding damages where a jurisdiction agreement is breached, the courts encourage contractual performance by imposing a financial consequence for breach, as is the case in respect of any other contractual term. This would likely help prevent forum shopping and therefore provide parties with greater certainty in their jurisdictional bargains. Furthermore, unlike anti-suit injunctions, damages – being a money judgment – are more likely to be enforced abroad. Foreign courts are generally quite willing to enforce foreign money judgments but are often less keen to enforce non-money judgments, such as an anti-suit injunction.

III. Anti-Arbitration Injunction

An anti-arbitration injunction is an order compelling a party not to commence or continue a domestic or foreign arbitral proceeding. Given that Nigerian courts are entitled to grant anti-suit injunctions in exceptional circumstances, there is no good reason why, by way of analogy, the Nigerian court should not, on truly exceptional grounds, grant an anti-arbitration injunction. Interestingly, when English courts were uncertain whether they could grant the remedy of an anti-arbitration injunction, they analogised some of the principles relating to the grant of anti-suit injunctions to the grant of anti-arbitration injunctions.[22]

The ACA is tailored towards the protection of arbitration agreements and the integrity of arbitral tribunals. Sections 4 and 5 of the ACA provide that the court has the power to stay proceedings if the defendant, at the time of appearance,

[21] See *Donohue v Armco Inc* [2001] UKHL 64, [48] (Lord Hobhouse); *Starlight Co v Allianz Marine & Aviation Versicherungs AG* [2014] Bus LR 873.

[22] See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

and before taking other steps in the proceedings, requests that the court stay the proceedings and refer the parties to arbitration on the basis that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and the applicant was, at the time when the action was commenced, ready, and still remains ready and willing to do all things necessary for the proper conduct of the arbitration.

Article II(3) of the New York Convention[23] also provides that a Contracting State, when seised of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration unless the agreement between the parties is null and void, inoperative, and incapable of being performed.

An unprincipled grant of an anti-arbitration injunction potentially violates Articles 4 and 5 of the ACA and Article II(3) of the New York Convention. An anti-arbitration injunction may also have the effect of ultimately interfering with the jurisdiction of an arbitral tribunal to determine its own jurisdiction, thereby violating the principle of competence-competence, and (in the case of foreign arbitral tribunals) interfering with the power of the supervisory court to determine how the conduct of arbitral proceedings should be conducted in its forum.

Given that Nigerian courts grant anti-suit injunctions in exceptional circumstances and are generally in favour of respecting the sanctity of arbitral agreements,[24] it is submitted that the grant of an anti-arbitration injunction should only be made in truly exceptional circumstances. A truly exceptional (though not decisive) circumstance in which a Nigerian court can grant an anti-arbitration injunction is where one of the parties breaches a forum selection clause to litigate or arbitrate in the Nigerian forum,[25] and where the foreign proceedings, on the facts of the case, are oppressive, vexatious, or unconscionable.[26]

It has been held that while Nigerian courts are not enabled by the ACA to grant anti-arbitration injunctions in domestic cases, an anti-arbitration injunction can be granted in international arbitration in exceptional cases.[27] *Statoil (Nig) Ltd v Nigerian National Petroleum Corporation* ('*Statoil*')[28] was the first reported case where the Court of Appeal considered the grant of an anti-arbitration injunction in a domestic case. The issue before the Court of Appeal was whether the

[23] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Arbitration and Conciliation Act implements the New York Convention in Nigeria.

[24] See generally *Owners of MV Lupex v Nigerian Overseas Chartering and Shipping Ltd* (2003) 15 NWLR 469.

[25] See also *Claxton Engineering Services Ltd v TXM Olaj-EsGazkutato Kft* [2011] EWHC 345 at [29]–[32].

[26] *The Shell Petroleum Development Company Nigeria Ltd v Crestar Integrated Natural Resources Ltd* (2016) 9 NWLR 300, 337; *Zenith Global Merchant Ltd v Zhongfu International Investment (Nig) FZE* (2017) All FWLR 1837, 1926–28.

[27] *The Shell Petroleum Development Company Nigeria Limited v Crestar Integrated Natural Resources Limited* (2016) 9 NWLR 300, 322–34; *Zenith Global Merchant Limited v Zhongfu International Investment (Nig) FZE* (2017) All FWLR 1837, 1926–28.

[28] (2014) 14 NWLR (Pt. 1373) 1.

Federal High Court was right to grant an *ex parte* interim anti-arbitration injunction to restrain continuation of the arbitral proceedings. The Court of Appeal held in the negative, and placed reliance on Section 34 of the ACA, which provides that: 'A court shall not intervene in any matter governed by this Act except where so provided in this Act.' The court stated that the intention of the legislature, in enacting the provisions in Section 34 of the Arbitration and Conciliation Act, was to protect the mechanism of arbitration, to prevent the courts from having direct control over arbitral proceedings and to prevent the courts from intervening in arbitral proceedings outside the circumstances specified in the Act. In other words, the intention of the legislature is to make arbitral proceedings an alternative to adjudication before the courts, and not an extension of court proceedings.[29] In the words of the Court of Appeal:

> The provisions of section 34 of the Arbitration and Conciliation Act … [are] mandatory in that the word 'shall' is one that does not accommodate a flexible interpretation of the directives being given therein … from all the provisions therein, no enactment for the determination prematurely of the proceedings of an arbitral tribunal is provided … In the instant case, the issuance of ex-parte interim injunction does not fall under the exceptions to sections 34 of the Act. It is very clear that from the intendment of the legislature that the court cannot intervene in arbitral proceeding outside those specifically provided. Where there is no provision for intervention, this should not be done.[30]

In *Nigerian AGIP Exploration Ltd v Nigerian National Petroleum Corporation*,[31] the appellant successfully obtained an arbitral award in Nigeria. The first respondent successfully challenged the award by obtaining an interim injunction from the Federal High Court. The Court of Appeal allowed the appellant's appeal. The Court of Appeal followed its decision in *Statoil* and held that the courts will not encourage the grant of an injunction to prevent the conclusion of the proceedings of an arbitral panel, especially when an aggrieved party has the right to seek redress in court to set aside the award, as provided by Sections 29, 30 and 48 of the Act. Tin Tur JCA, in a concurring judgment, held that:

> I have scanned the entire pages of the Arbitration and Conciliation Act, Cap A 18, Laws of the Federation of Nigeria, 2004 but I am unable to find the Section that provides for the Federal High Court to exercise the powers of entertaining and granting *ex parte* interim and interlocutory injunctions as the case may be to restrain arbitral proceedings from taking place or continuing to finality. The Federal High Court or any Court for that matter is not to exercise jurisdiction in arbitral causes and matters (except, where so provided for in this Act) according to the provisions of Section 34 of the Act.

In principle, although there is no provision of the ACA that explicitly prohibits the granting of anti-arbitration injunctions in domestic and international arbitration, the above Court of Appeal decisions might be justified on policy grounds of

[29] *Statoil (Nig) Ltd v Nigerian National Petroleum Corporation* (2014) 14 NWLR (Pt. 1373) 1, 25, 28, 29.
[30] ibid, 29.
[31] CA/A/628/2011 (unreported).

protecting domestic arbitration in Nigeria. In other words, if courts were enabled to grant anti-arbitration injunctions in domestic cases, it would be likely that the institution and efficacy of domestic arbitration in Nigeria might be put in jeopardy.

However, in *The Shell Petroleum Development Company Nigeria Ltd v Crestar Integrated Natural Resources Ltd* ('*Crestar*'),[32] the Court of Appeal held that anti-arbitration injunctions can be granted in matters of international arbitration in exceptional cases. In *Crestar*, the applicant instituted an action at the Federal High Court, Lagos against the respondent, concerning a contract which contained an arbitration agreement in respect of which the seat of arbitration was London. The applicant also challenged, *inter alia*, the arbitration agreement as illegal and in violation of Nigerian law. It applied for an injunction to restrain the respondents from taking further steps in the London arbitration. The Court of Appeal found merit in the applicant's prayer for an anti-arbitration injunction.

Adejumo-Obaseki JCA held that the provisions of Section 34 of the Act and the interpretation thereof by this court in *Statoil Nig Limited* (above), to the extent that Nigerian courts cannot intervene in arbitral matters, are not applicable in the instant case,[33] and that the Federal High Court can grant an order of injunction enjoining foreign arbitration proceedings.[34]

In *Zenith Global Merchant Ltd v Zhongfu International Investment (Nig) FZE* ('*Zenith Global Merchant*'),[35] the High Court of Ogun State (Akinyemi J) summed up the law as follows:

> While the law is settled that Nigerian courts do not have jurisdiction to grant anti-arbitration injunctions in respect of domestic arbitration, (see Section 34 of the Arbitration and Conciliation Act, and the cases of *State* [*sic*] *Oil Nig. Ltd v N.N.P.C.* … and *Nigerian Agip Petroleum Exploration v N.N.P.C.* … the position is now different in respect of international arbitrations. Recently in the case of *Shell Petroleum Co. of Nigeria Ltd v Crestar Integrated Natural Resources Ltd* … the Court of Appeal sitting at the Lagos division, while adopting the position in England held that the Federal High Court, acting pursuant to Section 13 of the Federal High Court Act, had the jurisdiction to grant an anti-arbitration injunction in respect of an international arbitration. The Court of Appeal then proceeded by virtue of section 15 of the Court of Appeal Act, to grant the said injunction, which it found to be necessary given the circumstances of the case.[36]

The issue in *Zenith Global Merchant* was whether the Ogun State High Court could grant an anti-arbitration injunction to permanently restrain the continuation of arbitration proceedings in Singapore, where, in the eyes of Akinyemi J, the parties had already waived their right and agreement to arbitration proceedings in

[32] (2016) 9 NWLR 300.
[33] *The Shell Petroleum Development Company Nigeria Ltd v Crestar Integrated Natural Resources Ltd* (2016) 9 NWLR 300, 324.
[34] ibid, 328.
[35] (2017) All FWLR 1837.
[36] ibid, 1923–24.

Singapore by resolving their dispute before a Nigerian court. Akinyemi J followed the Court of Appeal's decision in *Crestar* and held that:

> Indeed, as at the present time, *Crestar* remains the extant Nigerian law or '*locus classicus*' on the subject of anti-arbitration injunction in international arbitration. The fact that the injunction in this case is in nature of a 'forever' injunction rather than interim or interlocutory in *Crestar*, is because the arbitration in *Crestar* could still proceed after the determination of the validity of the arbitration clause, but in this case, as the basis of the application is waiver of the entire right to compel arbitration, the 'forever' nature of the relief sought is understandable, and right, in my view. In the circumstance, I consider *Crestar* not only relevant and applicable, but compelling and binding on this court, in so far as the issue of anti-arbitration injunction in international arbitration is concerned.[37]

Akinyemi J further held that the conditions laid down in *Crestar* are that: first, it must be shown by the applicant that the continuance of the foreign arbitration will be oppressive or vexatious and cause him injustice; and, second, the injunction must not cause injustice to the other party.[38]

As an alternative to an anti-arbitration injunction, a party could seek damages from the Nigerian court against a defendant who has brought an action abroad in breach of an arbitration agreement. Put differently, where the parties, as a term of their contract, agree to arbitrate in Nigeria, the Nigerian court can award damages against the party in breach of the agreement.[39]

IV. *Mareva* or Freezing Injunction

The principal concern of a judgment creditor is that it should reap the fruits of the judgment. A judgment is useless or nugatory if the judgment debtor has no assets within the jurisdiction of the court and the judgment debtor is unwilling to comply with the court's judgment. A prospective judgment debtor could frustrate the administration of justice and the commercial effectiveness of a judgment by moving away all its assets from the Nigerian jurisdiction to another jurisdiction. The remedy of a *Mareva* injunction (or freezing injunction) was developed as a means of curtailing this form of ill-intentioned litigation tactics by a judgment debtor. In reality, a *Mareva* injunction is similar to interlocutory and anticipatory injunctions. It is similar to an interlocutory injunction because it is granted pending the determination of the dispute between the parties. It is similar to an anticipatory injunction because it anticipates that there is a real likelihood that a

[37] ibid, 1925.

[38] ibid, 1926–27.

[39] *Cf* AA Olawoyin, 'Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bills of Lading' (2006) 17 *The American Review of International Arbitration* 239, 252–54, 265–67. See *Donohue v Armco Inc* [2001] UKHL 64 at [48] (Lord Hobhouse); *Starlight Co v Allianz Marine & Aviation Versicherungs AG* [2014] Bus LR 873.

prospective judgment debtor would take its assets out of the court's jurisdiction in order to frustrate the effectiveness of a judgment.[40]

The *Mareva* injunction (as applied in Nigeria) was developed in the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA 'The Mareva'* ('*The Mareva*').[41] It is also described as a 'freezing injunction' on the basis that the order freezes the assets of a prospective judgment debtor, pending the determination of the case.[42]

Prior to the decision of the English Court of Appeal in *The Mareva*, it was uncertain[43] whether the English court had jurisdiction to protect a creditor before it obtained a judgment. The English Court of Appeal, in 1975,[44] had initially granted a 'Mareva-type injunction' in the form of an interlocutory injunction, but the application of this concept in that case remained controversial.[45] The remedy of the *Mareva* injunction was later accepted by the then English House of Lords,[46] and is available in other Commonwealth jurisdictions.[47]

In the landmark case of *Sotuminu v Ocean Steamship (Nig) Ltd* ('*Sotuminu*'),[48] the Supreme Court of Nigeria legitimised the *Mareva* injunction, though on the facts of the case, the court did not think it was appropriate to grant a *Mareva* injunction. In *Sotuminu*, the plaintiff-appellant was a director of the first defendant-respondent company and also financed the existence of the first defendant-respondent company. He was a guarantor for a loan which was advanced by the sixth respondent. The plaintiff-appellant alleged that, in addition to him being a guarantor to the loan facility, he had an agreement (with the approval of the board of directors) which entitled him to five per cent of the gross earnings of the company. When a dispute arose between him and the first to fifth defendant-respondents, arising from an alleged failure to pay his five per cent of the gross earnings of the company, he claimed against the first to fifth defendant-respondents at the Lagos High Court. He also joined the sixth and seventh defendant-respondents for the purpose of getting a *Mareva* injunction,[49] *inter alia*, ordering the sixth and seventh defendant-respondents not to release funds held by the first defendant-respondent

[40] See Omo JSC in *Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 approving the English case of *Z Ltd v AZ and AA-LL* [1982] 2 QB 558, 584–86.

[41] [1980] 1 All ER 213.

[42] See generally *Dangabar v Federal Republic of Nigeria* (2012) LPELR-19732 (CA).

[43] 'I know of no case where, because it was highly improbable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.' – *Lister & Co v Stubbs* [1886–90] All ER Rep 797, 799 (Cotton LJ).

[44] *Nippon Yusen Kaisha v Karageorgis* (1975) 3 All ER 282.

[45] *Cf Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 (Nnaemeka-Agu JSC); *Adeyemi Durojaiye v Continental Feeders (Nig) Limited* (2001) LPELR-CA/L/445/99 (Aderemi JCA, as she then was).

[46] *Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naveria SA* [1979] AC 210.

[47] Andrew J Moran and Anthony J Kennedy, *Commercial Litigation in Anglophone Africa* (Cape Town, Juta and Company (Pty) Ltd, 2018) at 47–50, 87–88, 136–138, 172–173, 238–240, 300–301, 342–344, 480–482, 525–526, 554–557, 618–619, 666–667, 718–719, 768–769, 821–823.

[48] (1992) LPELR-SC 55/1990.

[49] Described as an interlocutory injunction by the High Court judge.

company in their bank. The High Court granted the requested *Mareva* injunction on the condition that the plaintiff-appellant provided an undertaking for damages. The High Court eventually dismissed the plaintiff-appellant's case and consequently discharged the *Mareva* injunction.

Dissatisfied with the judgment, the plaintiff-appellant appealed against it to the Court of Appeal and then applied to the learned trial judge for a stay of the execution of the judgment pending the determination of the appeal and for an injunction to restrain the sixth and seventh respondents from releasing any funds from the accounts' of the first respondent. The application was refused and dismissed by the learned trial Judge. The appellant then made the same application to the Court of Appeal, but the application was dismissed. On appeal to the Supreme Court, the plaintiff-appellant's case was also unsuccessful.

Interestingly, although the decision of the Supreme Court was unanimous in dismissing the plaintiff-appellant's case, Uwais JSC (as he then was), with whom two other Justices of the Supreme Court simply concurred, treated the plaintiff-appellant's case as one involving an interlocutory injunction, and applied the principles relating to the grant of an interlocutory injunction. It was Nnaemeka-Agu JSC and Omo JSC who qualified the plaintiff-appellant's case as one involving a *Mareva* injunction.

Nnaemeka-Agu JSC made reference to Section 18(1) of the then High Court of Lagos State (Civil Procedure) Rules, which provides that '[t]he High Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so'; and Section 13 of the same, which provides that

> subject to the express provisions of any enactment, in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by the High Court of Justice in England.

He was of the view that these provisions enabled a court in Nigeria to apply the principles of a *Mareva* injunction. The learned Justice set out the criteria to grant a *Mareva* injunction when he held that:

> Now, all decided cases on the point show that the Courts are ever conscious of the fact that because of its very nature, Mareva injunctions could be open to abuses. So they have evolved some rules and principles which are designed to guard against such abuses. By these rules, before a Mareva injunction could be granted the applicant must show:–
>
> (i) that he has a cause of action against the defendant which is justiciable in [Nigeria]:[50] See – *Siskina (Owners of Cargo lately laden on board) v distas Compania S.A.* (1979) A.C. 210;
>
> (ii) that there is a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain: See – *Barclay-Johnson v. Ynill* (1980) 1 WLR 1259, at p.1264: also – *Rahman (Prince Abdul) him Turki al Sudiary v Abu-Taha* (1980) 1 WLR 1268, at p.1272;

[50] The original judgment contains 'in England'. We have substituted it with the phrase 'in Nigeria' to appropriately suit the Nigerian context.

> (iii) that the applicant has made a full disclosure of all material facts relevant to the application: see – *Negocios Del Mar SA v. Doric Shipping Corp. SA. (The Assios)* (1979) 1 Ll. Rep. 331;
> (iv) that he has given full particulars of the assets within the jurisdiction;
> (v) that the balance of convenience is on the side of the applicant; and
> (vi) that he is prepared to give an undertaking as to damages.
>
> If he fails to satisfy the Court in any of these preconditions for a grant of a Mareva injunction, it ought not to be granted.[51]

In *Adeyemi Durojaiye v Continental Feeders (Nig) Ltd* ('*Durojaiye*'),[52] the plaintiff-appellant and defendant-respondent had the relationship of a sub-lessor and sub-lessee by virtue of a deed of sublease. The plaintiff-appellant made a claim against the defendant-respondent, *inter alia*, for rent and specific performance before the High Court of Lagos. The plaintiff-appellant, *inter alia*, also made an *ex parte* application for a *Mareva* injunction, restraining the defendant-respondent from spending or tampering with, in any manner whatsoever, the sum of ₦4,632,000.00, being the balance of what should accrue to the plaintiff-appellant from the total annual rent collected from the defendant-respondent. The order was granted by the trial judge. The defendant-respondent was subsequently put on notice and the trial judge discharged the injunction, on the basis that a *Mareva* injunction is coercive and should be granted rarely; the plaintiff had failed to satisfy the conditions for the grant of a *Mareva* injunction.

On appeal to the Court of Appeal, the plaintiff's case was unanimously allowed. Aderemi JCA (as she then was) restated and applied the principles relating to the grant of a *Mareva* injunction as formulated by Nnaemeka-Agu JSC in the *Sotuminu* case and applied them to the facts of the case:

> There is nothing from the printed evidence of the respondent denying this crucial averment which not only shows that the defendant/respondent has assets within jurisdiction but goes further to furnish the particulars of the assets and their location … And having given an undertaking as to damages, I would think that the plaintiff/appellant has satisfied all the conditions needed for the grant of a Mareva injunction.[53]

In *Compact Manifold and Energy Services Ltd v West Africa Supply Vessels Services Ltd*,[54] the plaintiff-respondent alleged, *inter alia*, that the defendant-appellant had no fixed assets in Nigeria and that the only assets it had within jurisdiction of the court were two barges, which are seagoing vessels. The plaintiff-respondent alleged its fear that, once served with court proceedings, the defendant-appellant would remove the said vessels due to its un-cooperative attitude towards the

[51] *Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990. See also *AIC LTD v Nigerian National Petroleum Corporation* (2005) LPELR-6 (SC) 33–34 (Edozie JSC); *R Benkay (Nig) Ltd v Cadbury (Nig) Plc* (2006) 6 NWLR (Pt. 976) 338; *International Finance Corporation v DSNL Offshore Ltd* (2007) LPELR-5140 (CA) 12–13 (Rhodes Vivour JCA (as he then was).

[52] (2001) LPELR-CA/L/445/99.

[53] *Adeyemi Durojaiye v Continental Feeders (Nig) Ltd* (2001) LPELR-CA/L/445/99. See also *AIC Ltd v Edo State Government* (2016) LPELR-40132 (CA).

[54] (2017) LPELR-43537 (CA).

payment of its debt to the plaintiff-respondent. The Court of Appeal restated and applied the principles relating to the grant of a *Mareva* injunction as formulated by Nnaemeka-Agu JSC in the *Sotuminu* case and granted the *Mareva* injunction in this case.

Although the preceding cases dealt with assets in Nigeria, in *Dangabar v Federal Republic of Nigeria*[55] it was held, in *obiter*, that the Nigerian court can make freezing orders against assets within the jurisdiction and outside the jurisdiction, including the assets in the name of third parties if it can be established that those assets are beneficially owned by a defendant.[56]

In addition to the *Mareva* injunction, the High Court Civil Procedure Rules of some States in Nigeria make special provisions relating to 'interim attachment of property'. These uniform rules provide that:

1. (a) Where the defendant in any suit with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction; or
   (b) where, in any suit founded on contract or for detinue or trover in which the cause of action within the jurisdiction:-
      (i) the defendant is absent from jurisdiction, or there is probable cause to believe that he is concealing himself to evade service; and
      (ii) the defendant is beneficially entitled to any property in the State in the custody or under the control of any other person in the State, or such person is indebted to the defendant, then in either such case the plaintiff may apply to the Court either at the time of the institution of the suit or at any time thereafter until final judgment to call upon the defendant to furnish sufficient security to fulfill any decree that may be made against him in the suit, and on his failing to give such security, or pending the giving of such security, to direct that any property movable or immovable belonging to the defendant shall be attached until the further order of the Court.
2. The application shall contain a specification of the property required to be attached, and the estimated value thereof so far as the plaintiff can reasonably ascertain the same, and the plaintiff shall, at the time of making the application, declare that to the best of his information and belief the defendant is about to dispose of or remove his property with such intent as aforesaid.
3. If the Court after making such investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to order the defendant within a time to be fixed by the Court either to furnish security in such sum as may be specified in the order [or] to produce and place at the disposal of the Court when required the said property, or the value of the same, or such portion thereof as may be sufficient to fulfil the decree, or to

[55] (2012) LPELR-19732 (CA).
[56] *Dangabar v Federal Republic of Nigeria* (2012) LPELR-19732 (CA) 20–21.

appear and show cause why he should not furnish security. Pending the defendant's compliance with such order, the Court may by warrant direct the attachment until further order of the whole, or any portion, of the property specified in the application.

4. If the defendant fails to show such cause, or to furnish the required security within the time fixed by the Court, the Court may direct that the property specified in the application if not already attached or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order. If the defendant shows such cause, or furnishes the required security, and the property specified in the application or any portion of it, shall have been attached, the Court shall order the attachment to be withdrawn.
5. The attachment shall not affect the rights of persons not parties to the suit, and in the event of any claim being preferred to the property attached before judgment, such claim shall be investigated in the manner prescribed for the investigation of claims to property attached in execution of a decree.
6. In all cases of attachment before a judgment, the Court shall at any time remove the same, on the defendant furnishing security as above require, together with security for the costs of the attachment, or upon an order for a non-suit or striking out the cause or matter.
7. The application may be made to the Court in the Judicial Division where the defendant, or in case of urgency, where the property proposed to be attached, may be, and such Court may make such order as shall seem just. In case an order for the attachment of property shall be issued by a different Court from that in which the suit is pending, such Court shall, on the request of either of the parties, transmit the application and evidence therein to the Court in which the suit is so pending, retaining the property in the meantime under attachment or taking sufficient security for its value and the Court in which the suit is pending shall thereupon examine into and proceed with the application in accordance with the foregoing provisions, in such manner as shall seem just.[57]

In *General Development Co Ltd v Rad Forest Products Ltd* ('*Rad*'),[58] the Ghanaian Court of Appeal, in construing a related Civil Procedure Rule on interim attachment of property, held as follows:

(a) As decided in *Garrard v. Edge & Son* (1889) 58 LJ Ch 397, CA, the order must be made against the person in possession or custody of the property in dispute. See also *Wilder v. Wilder and Charters (No 2)* (1912) 56 SJ 571, CA.

(b) The property must be the subject matter of the suit. Thus in *Scott v. Mercantile Accident Insurance Co* (1892) 8 TLR 431 the lower court made an order that

[57] Order 8 of the Abia State High Court (Civil Procedure) Rules 2009; Order 15 of the Abuja, Federal Capital Territory High Court (Civil Procedure) Rules 2004 (the 2018 Abuja rules appear to be silent on this); Order 16 of the Adamawa State High Court (Civil Procedure) Rules 1991; Order 16 of the Bauchi State High Court (Civil Procedure) Rules 1987; Order 16 of the Gombe State High Court (Civil Procedure) Rules 1987; Order 16 of the Kano State High Court (Civil Procedure) Rules 1987; Order 16 of the Kastina State High Court (Civil Procedure) Rules 1998; Order 16 of the Kebbi State High Court (Civil Procedure) Rules 1987.

[58] (1999–2000) 2 GLR 178.

certain jewellery should remain in the custody of the police. An appeal against this order was allowed because it was admitted on the evidence that the property was not the subject-matter of the action, but that only a question might arise about it in the cause or matter.

(c) It was held in *Leney & Sons, Ltd v. Callingham & Thompson* [1908] KB 79 at 84 per Farwell LJ that:

'… the question of the exercise of the judicial discretion was always based, and is still based, upon this, that there is property in dispute to some interest in which the plaintiff shows a *prima facie* title; and preservation is ensured until the rights of the parties can be finally determined.'

(d) The case of *Chaplin v Barnett* (1912) 28 TLR 256, CA decides that the order will be granted so long as there is something which ought to be done to ensure the security of the property.

(e) An order will be made in order to preserve the subject-matter of the suit from destruction: see *Strelley v. Pearson* (1880) 15 Ch D 113 where the court granted an order restraining the defendants from ceasing to pump water out of a mine for the sole purpose of preventing the mine from destruction.

(f) The court will also grant an order in court to preserve the subject-matter from depreciation physically or in value. So if it is established that it is necessary to do so the court will grant it; hence an order was made in the case of *Steamship New Orleans Co v London and Provincial* [1909] 1 KB 943, CA that a ship lying in Singapore be brought to England for preservation there. However, an order may not be made if it will cause undue hardship in carrying it out or will serve no useful purpose.

In the absence of Nigerian case law on interim attachment of property, we recommend that Nigerian courts can draw useful comparative insights from the Ghanaian case of *Rad*.

Though *Mareva* injunctions and interim attachment of property are similar, they are not the same.[59] There are two key differences between a *Mareva* injunction and interim attachment of property.[60] First, unlike a *Mareva* injunction, interim attachment of property is intended to give the claimant security for his claim in the circumstances provided for in the relevant Civil Procedure Rules, whereas a *Mareva* injunction does not give the applicant security over the assets frozen by the order.[61] Second, interim attachment of property operates (in effect) *in rem* (property or money must be produced), whereas a *Mareva* injunction operates *in personam*.[62]

[59] *Cf* Where a Kenyan judge (Gikonyo J) held that interim attachment of property could be said to be [and is] 'a statutory codification of an interlocutory relief commonly known as *Mareva injunction* or freezing order in the UK …' *Kanduyi Holdings Ltd v Balm Kenya Foundation* (2013) eKLR, H Ct (21).

[60] AJ Moran and A Kennedy, *Commercial Litigation in Anglophone Africa* (Cape Town, Juta, 2018) 144–45.

[61] ibid, 145.

[62] ibid, 145.

In essence, the true purpose of an interim attachment of property

> is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of guarantee against the decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree.[63]

V. Security for Costs in Support of Foreign Proceedings

Section 10(1) and (2) of the Admiralty Jurisdiction Act (the 'AJA') provide that

> (1) Without prejudice to any other power of the [Federal High Court]:–
>
> *(a)* where it appears to the Court in which a proceeding commenced under this Act is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country; and
>
> *(b)* where a ship or other property is under arrest in the proceeding, the Court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the Court of the foreign country.
>
> (2) The power of the Court to stay or dismiss a proceeding commenced under this Act includes power to impose any condition as is just and reasonable in the circumstances, including a condition–
>
> *(a)* with respect to the institution or prosecution of the arbitration or proceeding in the court of a foreign country; and
>
> *(b)* that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of a foreign country.

In *NV Scheep v S Araz*,[64] the Supreme Court held that Section 10 of the AJA could only be utilised in relation to a pending claim before the Federal High Court that was brought on the merits of the case.[65] The Supreme Court held in this regard that a plaintiff cannot use Section 10(1) and (2) of the AJA *simply* for the purpose of arresting a ship or property in the Federal High Court, or for obtaining security for damages in anticipation of a potential judgment or award that may be reached in proceedings already pending in another forum,[66] but that it *could* be utilised for the purpose of enforcing an existing judgment or award.[67]

[63] *Sardar Govindrao Mahadik v Devi Sahai* [1982] 1 SCC 237, AIR 1982 SC 989, [1982] 2 SCR 186, Indian Supreme Court (Desai DA) – cited in AJ Moran and A Kennedy, *Commercial Litigation in Anglophone Africa* (Cape Town, Juta, 2018) 145.

[64] (2001) 4 WRN 105.

[65] *NV Scheep v S Araz* (2001) 4 WRN 105, 133–36 (Ogundare JSC); 151–52 (Karibi-Whyte JSC); 155–57 (Onu JSC); 158 (Achike JSC); 158 (Kalgo JSC).

[66] ibid, 133–36 (Ogundare JSC); 153 (Karibi-Whyte JSC).

[67] ibid, 133–36 (Ogundare JSC).

The facts of this case are that the second defendant-respondent, by a charter-party, hired a vessel from the plaintiff, which was later detained as a result of a dispute between the parties. The detention of the vessel resulted in a claim made by the plaintiff against the second defendant-respondent for demurrage or damages in the London Arbitral Tribunal. In the arbitral proceedings in London, the defendant failed to comply with the order of the tribunal to provide security for damages in anticipation of a potential award. The plaintiff's agent, therefore, brought proceedings before the Federal High Court, Lagos division for the arrest and detention of the vessel allegedly belonging to the second defendant, called MV 'Saraz', within its jurisdiction, and that the vessel be released from arrest only upon the defendants-respondents furnishing an acceptable bank guarantee in the sum of US$300,000 to meet the claim of the plaintiff in the London arbitral proceedings. The Federal High Court granted this application. On appeal, the Court of Appeal allowed the appeal and set aside the judgment of the Federal High Court. On further appeal to the Supreme Court, the Supreme Court sustained the Court of Appeal's decision.

It is submitted that the Supreme Court is right. Section 10 of the AJA has two conditions: there must be an action pending before the Federal High Court in which a stay was requested by the defendant and there must have been an arrest. The provision is really about the need to impose a condition on granting a stay so that the interest of the plaintiff, who had hitherto secured an arrest, is protected. It is not a provision that can be used to arrest ships in the 'abstract'.

The Supreme Court's decision, however, exposes a larger problem. The plaintiff may not be in a position to effectively bring proceedings in breach of an arbitration agreement or foreign jurisdiction clause in the Nigerian court on the merits of the case because the foreign court may issue an anti-suit injunction in this regard. It is unclear what the remedy is for a claimant who institutes proceedings in a foreign forum and then sues in Nigeria simply to obtain interim relief from the Nigerian court. In respect of foreign arbitral proceedings, it has been argued that the court could enforce the interim relief the arbitral tribunal makes pursuant to Section 13 of the ACA. In respect of foreign judicial proceedings, the position appears more problematic, as under common law, the Nigerian court can only enforce a fixed money judgment that is final; it cannot enforce interim measures such as an injunction. This is an area that requires legislative intervention in Nigeria, in the absence of which it would take a bold and innovative Supreme Court to develop the common law to include the enforcement of interim measures to support foreign judicial proceedings.

VI. Conclusion

This chapter discussed remedies in support of or against foreign judicial and arbitral proceedings. Nigerian courts have the power to grant an anti-suit injunction in

exceptional circumstances. It was submitted that Nigerian courts, in truly exceptional circumstances, are also empowered to grant an anti-arbitration injunction. Nigerian courts have the power to grant a *Mareva* or freezing injunction if the applicant satisfies the required legal conditions. In Admiralty proceedings, a Nigerian court can provide security for costs to satisfy a potential judgment award in a foreign forum if proceedings are instituted in Nigeria on the merits of the case.

21

Service of Legal Process and Taking Evidence

I. Introduction

This chapter deals with the service abroad of a legal process or document emanating from a Nigerian court, and with the service in Nigeria of a legal process or document emanating from a foreign court or tribunal. The chapter also examines taking evidence abroad for use in legal proceedings in Nigeria, as well as taking evidence in Nigeria for use in legal proceedings abroad.[1]

In Nigeria, these issues are largely regulated by State and Federal statutes; there are hardly any cases that have litigated the relevant laws.[2] Each State High Court in the Nigerian federation, the Federal High Court, as well as the High Court of the Federal Capital Territory, Abuja has its own civil procedure rules that govern these issues. In other words, there are no uniform rules on civil procedure which apply to all High Courts in Nigeria. In recent times, some of the extant civil procedure rules have undergone reform. This chapter focuses on three of the latest rules, namely the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018 ('Abuja Rules'); the High Court of Lagos State (Civil Procedure) Rules 2019 ('Lagos Rules'), and the Federal High Court (Civil Procedure) Rules 2019 ('Federal Rules') – together the 'Civil Procedure Rules'.

There are international conventions dealing with these issues, but Nigeria is not party to any such conventions. The conventions include the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Bilateral agreements are also another means for dealing with issues in this area. However, we are not aware of any bilateral treaty concluded between Nigeria and another state that is relevant

[1] The legal bases for service out of the jurisdiction in order to confer jurisdiction on a Nigerian court regarding a claim involving a foreign element has been addressed in Chapter 5 of this book. Post-trial assistance, in the form of the enforcement of foreign judgments has been addressed in Chapters 17 and 18 of this book. See generally David McClean, *International Co-operation in Civil and Criminal Matters*, 3rd edn (Oxford, Oxford University Press, 2012).

[2] The situation is different regarding the service of legal process within Nigeria: see Chapter 5 of this book.

to this chapter.[3] Although Nigeria is not a party to any international convention on the service of documents, the Civil Procedure Rules provide separate procedures for service of documents to and from countries that are signatories to a Convention ('convention countries') and those not party to a Convention ('non-convention countries'). Arguably, this anticipates that Nigeria may, in the future, become a party to such international conventions.

II. Service of Legal Process Out of Nigeria

The Civil Procedure Rules allow for the service of an originating process and other legal documents outside the jurisdiction. Under the Federal Rules, these documents include originating summonses, petitions, notices of motion, summonses, orders and notices of any proceeding.[4]

The proper mode of service depends on the type of document at issue and whether the document emanates from a convention or non-convention country. Under Order 8 rule 3 of the Abuja Rules:

> Where leave is granted to serve an originating process in any foreign country with which no convention in that behalf has been made, the following procedure may be adopted:
>
> (a) The process to be served shall be sealed with the seal of the court for service outside Nigeria, and shall be transmitted to the Solicitor General of the Federation by the Chief Registrar, with a copy translated, if not in English, into the language of that country and with a request for its further transmission to the appropriate authority.
>
> …
>
> (c) A certificate, declaration, affidavit or other notification of service transmitted to the court through diplomatic channels by a court or other appropriate authority of the foreign country, shall be deemed good and sufficient proof of service.[5]

Similar provisions are contained in Order 6 rule 18(1) of the Federal Rules and Order 10 rule 3(1) of the Lagos Rules. It is evident from the Federal Rules, but less so from the Lagos Rules and Abuja Rules, that service has to be effected in accordance with the laws of the foreign country. This is consistent with the principle that matters of procedure are governed by the *lex fori*. In other words, the Civil Procedure Rules do not seek to dictate a particular mode of service once the relevant document leaves Nigeria.

[3] Nigeria recently enacted the *Mutual Assistance in Criminal Matters Act* 2019. However, the focus of the Act is outside the subject matter of this book.

[4] Federal Rules, Order 6 r 17(1).

[5] A similar provision is contained in the Order 10 r 3 of the Lagos Rules. It provides that notwithstanding the provisions of sub-rule (1), a Claimant may with the leave of a Judge serve an originating process by courier.

A slightly different procedure exists with respect to convention countries. Order 8 rule 4 of the Abuja Rules provides that:

> (1) Where leave is granted or is not required in a civil suit and it is desired to serve any process in a foreign country with which a convention in that behalf has been made, the following procedure shall subject to any special provision contained in the convention, be adopted:
>
> (a) The party desiring such service shall file in the registry a request as in Form 11 with such modifications or variations as circumstances may require and the request shall state the medium through which it is desired that service shall be effected, either; (i) Directly through diplomatic channels or (ii) Through the foreign judicial authority;
>
> (b) The request shall be accompanied by the original document and a translation in the language of the country in which service is to be effected, certified by or on behalf of the person making the request, and a copy of each for every person to be served and any further copies which the convention may require (unless the service is required to be made on a Nigerian subject directly through diplomatic channels in which case the translation and copies need not accompany the request unless the convention expressly requires that they should do so);
>
> (c) The documents to be served shall be sealed with the seal of the court for use out of the jurisdiction and shall be forwarded by the chief registrar to the permanent secretary, federal ministry of foreign affairs for onward transmission to the foreign country;
>
> (d) An official certificate, transmitted through the Nigerian diplomatic agent to the court, establishing the fact and the date of the service of the document, shall be deemed to be sufficient proof of service within the requirements of these rules.

Similar provisions are contained in Order 6 rule 20 of the Federal Rules and Order 10 rule 4 of the Lagos Rules. In situations where there is a convention, the Civil Procedure Rules are subject to any special provisions contained in the convention. In those situations in which there is no convention, the sole medium of service is through diplomatic channels. However, where a convention exists, an additional medium through the foreign judicial authority is available to the party wishing to serve the document.

The Civil Procedure Rules provide that the court, in granting leave to serve a process out of jurisdiction, may, upon request thereof in an appropriate case, direct that courier or airmail service shall be used by the party effecting service.[6] The true scope of this provision does not appear entirely clear. However, it could be argued that it leaves room for dispensing with the need for service through diplomatic channels or through foreign judicial authorities. This comes out clearly from the Lagos Rules,[7] but less so in the other rules. This is a significant accommodation in the Civil Procedure Rules because service through diplomatic channels and

[6] Abuja Rules, Order 8 r 4(2); Federal Court Rules, Order 6 r 22; Lagos Rules, Order 10 r 4(2).
[7] Lagos Rules, Order 10 r 3(2).

foreign judicial authorities can take considerable time. Service by a party could ensure an expedited service.[8]

Indeed, in a further nod to party autonomy in this area, both the Abuja Rules and Lagos Rules give effect to contractual arrangements of parties regarding service. Order 8 rule 2 of the Abuja Rules provides that

> where parties have by their contract prescribed the mode or place of service, or the person that may serve or the person who may be served any process in any claim arising out of the contract, service as prescribed in the contract shall be deemed good and sufficient service.[9]

III. Service of Foreign Legal Process in Nigeria

The Civil Procedure Rules allow for the service in Nigeria of legal documents emanating from foreign countries. Different procedures are outlined in the Lagos Rules and Abuja Rules for requests coming from convention and non-convention countries. The Federal Rules provide procedures for only convention countries.

Order 8 rule 5 of the Abuja Rules provides that:

> Where in any civil or commercial matter pending before a court or tribunal of a foreign country a letter of request from such court or tribunal for service on any person or citation in such matter is transmitted to the court by the Attorney-General of the Federation stating that it is desirable that effect be given to it, the following procedure shall be adopted:
>
> (a) The letter of request for service shall be accompanied by two copies of the process or citation in English and two translated copies to be served.
> (b) Service of the process or citation shall be effected by a process server unless the court otherwise directs.
> (c) Service shall be effected by delivering to and leaving with the person to be served a copy of the process or citation, and a translated copy in accordance with the rules and practice of the court.
> (d) The process server shall file an affidavit of service after service has been effected which shall include particulars of charges for the cost of effecting the service. The affidavit shall be transmitted to the chief registrar with one copy of the process annexed.
> (e) The registrar shall examine and verify the particulars of charges, approve or vary it (a lesser figure).
> (f) The chief judge shall forward to the Attorney-General a letter of request for service, the approved amount for service, evidence of service and a certificate appended to it.[10]

[8] It is doubtful whether such direct personal service of legal process in a foreign country will not be deemed an infringement on the sovereignty that country, especially in civil law countries where the service of documents tends to be a judicial function and closely regulated by legislation.

[9] See also Lagos Rules, Order 10 r 2. The Federal Rules do not contain a similar provision.

[10] Similar provision is in the Lagos Rules, Order 10 r 5.

Regarding convention countries, Order 8 rule 7 of the Abuja Rules provides that:

> Where in any civil suit pending before a court or tribunal in a foreign country with which a convention in that behalf has been made, request for service of any process or document on any person within the jurisdiction is received by the chief judge from the appropriate authority in that country, the following procedure shall, subject to any special provisions in the convention, be adopted:
>
> (a) The process server shall deliver the original or a copy, along with a copy of its translation to the party to be served;
> (b) The process server shall submit the particulars of the costs and expenses of service to the registrar who shall certify the amount payable for service;
> (c) The registrar shall transmit to the appropriate foreign authority a certificate establishing the fact and date of service, or indicate reasons for failure to serve, and notify the authority of the amount certified under paragraph (b) of this rule.[11]

Order 6 rule 23 of the Federal Rules contains similar rules regarding convention countries but, as noted above, does not address documents from non-convention countries. It provides that:

> Where in any civil cause or matter pending before a court or tribunal in any foreign country with which a Convention in that behalf has been or shall be made, a request for service of any document on any person within the jurisdiction is received by the Chief Judge from the consular or other authority of the country, the following procedure shall. subject to any special provision contained in the Convention, be adopted–
>
> (a) the service shall be effected by the delivery of the original or a copy of the document, as indicated in the request and the copy of the translation, to the party or person to be served in person by an officer of the court. unless the Court or a Judge in chambers thinks fit otherwise to direct:
> (b) there shall be no court fees charged in respect of the service but the particulars of charges of the officer employed to effect service shall be submitted to the Chief Registrar of the Court who shall certify the amount properly payable in respect of it:
> (c) the Chief Judge shall–
>   (i) transmit to the consular or other authority making the request a certificate establishing the fact and the date of the service in person, or indicating the reason for which it has not been possible to effect it, and
>   (ii) notify the consular or any other authority the amount of the charges certified under paragraph (b) of this rule.

IV. Obtaining Evidence Abroad

The need for a regime to obtain evidence abroad arises in a situation in which the person from whom the evidence is sought is outside the relevant jurisdiction and is not prepared to provide evidence voluntarily. The Civil Procedure Rules provide

[11] Similar provision is in the Lagos Rules, Order 10 r 7.

for the examination of such witnesses abroad. Order 34 rules 7 and 8 of the Abuja Rules provide that:

> 7. Where an order is made for the issue of a request to examine witness or witnesses in any foreign country with which a convention in that behalf has been or shall be made, the following procedure shall be adopted:
>
> (a) The party obtaining such order shall file in the registry an undertaking as in form 25 which may be necessary to meet the circumstances of the particular case;
>
> (b) The undertaking shall be accompanied by–
>
> (i) A request as in Form 26, with such modifications or variations as may be directed in the order for its issue, with translation in the language of the country in which it is to be executed (if not English);
>
> (ii) A copy of the interrogatories (if any) to accompany the request(s), with a translation, if necessary;
>
> (iii) A copy of the cross-interrogatories (if any) with a translation, if necessary.
>
> 8. Where an order is made for the examination of a witness or witnesses before the Nigerian Diplomatic Agent in any foreign country with which a Convention in that behalf has been made, the order shall be as in Form 27. The Form may be modified or varied as may be necessary to meet the circumstances of the case.[12]

The above rules merely stipulate the conditions under which the respective High Courts may grant an application for the examination of a foreign witness on commission. Consistently with the principles of private international law, whether the foreign state assists in obtaining the evidence of such witnesses, and if so, how such an examination is conducted, will depend on the laws of the foreign state.

The Civil Procedure Rules provide that any officer of the court or other person directed to take the examination of any witness or person, or any person nominated or appointed to take the examination of any witness or person, pursuant to the provisions of any convention now made or which may be made with any foreign country, may administer oaths.[13] The letter of request to take evidence abroad is directed to the competent judicial authority of the foreign country. Alternatively, the court could appoint a Nigerian Diplomatic Agent as a special examiner, thus dispensing with the need to use to courts of the foreign country. It is submitted that in appointing a Nigerian Diplomat as a special examiner, the court should take into account the judicial or legal skills possessed by the consul. Where such skills are lacking, the court should be cautious of making such an appointment, or should attach conditions that mandate the presence of counsel during the taking of evidence.

Both the Lagos Rules and Abuja Rules are silent on how evidence may be taken regarding non-convention countries. In general, in the common law tradition, it is the parties' responsibility to prepare their respective cases for trial. This includes securing relevant evidence to support their case. It is for the parties to obtain and

[12] Similar provision is in Lagos Rules, Order 36 r 7 and 8, Federal Rules, Order 20 r 6 and 7.

[13] Abuja Rules, Order 34 r 15; Lagos Rules, Order 36 r 15; Federal Rules, Order 20 r 14.

present the evidence which they need by their own means, provided always that such means are lawful in the country in which they are used. Thus, in the absence of a specific statutory regime, the burden is on the affected party to secure the evidence. One means of doing this would be to apply to the foreign court to assist them in collecting the evidence in support of the Nigerian proceedings.

Indeed, it can be argued that a Nigerian court has inherent jurisdiction to issue a letter of request to a foreign judicial authority asking the foreign court to take, or cause to be taken, the required evidence. In the English case of *Panayiotou v Sony Music Entertainment (UK) Ltd*,[14] the court held that the power of the High Court to issue a letter of request to the court of another country for assistance in obtaining the production of a document as evidence in an action stems from the court's inherent jurisdiction. Such jurisdiction is exercisable when the request is confined to a particular document which is admissible in evidence, directly material to an issue in the action, the court is satisfied that the document exists or did exist, and the document is likely to be in the possession of the person from whom production is sought.

V. Obtaining Evidence in Nigeria

Before 1990, the United Kingdom's Evidence by Commission Act, 1859 and the Foreign Tribunals Evidence Act, 1856 regulated requests from courts abroad wishing to obtain evidence in Nigeria. However, Nigeria repealed both Acts in 1990 and they are thus no longer applicable in Nigeria.[15] At present, the taking of evidence is governed by the rules of the High Court in whose jurisdiction the evidence to be obtained is located.[16] There is no Federal legislation on the subject.

The Civil Procedure Rules do not address the extent to which their courts can assist foreign courts in obtaining evidence in Lagos and the Abuja Federal Capital Territory.[17] It appears that the courts have no inherent jurisdiction at common law

[14] [1994] Ch 142.

[15] See PCL Schleiffer Marais, *Cross-Border Taking of Evidence in Civil and Commercial Matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda* (PhD Thesis, University of Pretoria, 2013) 185–86.

[16] *Industrial Bank Limited (Merchant Bankers) v Central Bank of Nigeria* (1998) FHCLR 72 cited in PCL Schleiffer Marais, *Cross-Border Taking of Evidence in Civil and Commercial Matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda* (PhD Thesis, University of Pretoria, 2013) 190–91.

[17] Historically, Order 39 r 41 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2012 provided that: 'When any civil or criminal matter is pending before a court or tribunal of a foreign country and it is made to appear to the Court by commission rogatoire, or letter of request or other sufficient evidence that that court or tribunal is desirous of obtaining the testimony in relation to the matter of any witness or witnesses within the jurisdiction, the Court may, on the ex parte application of any person shown to be duly authorised to make the application on behalf of the foreign court or tribunal and on production of the commission rogatoire or letter of request or such other evidence as the Court may require or consider sufficient, make such order or orders as may be necessary to give effect to the intention of the commission rogatoire, or letter of request.' It is not clear why this provision has been omitted from the current Abuja Rules.

to order the taking of evidence at the request of a foreign court, and that this is a matter that should be regulated purely by statute.[18]

It is submitted that voluntary depositions may be conducted in Nigeria regardless of the nationality of the witness, provided no compulsion is used in obtaining the evidence. In this regard, given that Nigeria is a party to the Vienna Convention on Consular Relations, 1963, consular officers of foreign states may also take evidence, given voluntarily, as part of their consular functions.[19]

VI. Conclusion

The service of legal documents and the obtaining of evidence are important processes in international litigation. For example, regarding originating processes such as writs, service of the process abroad will give jurisdiction to the foreign court; without such service the court will have no jurisdiction over the claim. Similarly, obtaining evidence abroad for litigation in Nigeria or in Nigeria for litigation abroad is essential to the fact-finding role of the court and thus, the effective administration of justice.

It is regrettable that Nigeria is not a party to any of the international conventions that address issues in this area. It is recommended that, as anticipated in the Civil Procedure Rules, Nigeria should become a party to the international conventions that govern this area, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Nigeria should also consider entering into bilateral agreements, especially with neighbouring countries and its leading trading partners, to address the issues discussed in this chapter.

[18] L Collins et al, *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn (London, Sweet & Maxwell, 2012) para 8-095.

[19] Vienna Convention on Consular Relations, 1963 art 5(f) and (j).

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