

**A COMPARATIVE ANALYSIS OF THE ENFORCEMENT OF FOREIGN JUDGMENT IN
NIGERIA AND UNITED KINGDON:**

A CASE FOR CYBER JURISDICTION

BY

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MARCH, 2016.

DECLARATION

I here declare that the work in this dissertation titled:”A Comparative Analysis of the Enforcement of Foreign Judgment, in Nigeria and United Kingdom: A Case for Cyber – jurisdiction” was performance by me in partial fulfillment of the requirements for the award of Master of Laws Degree (LL.M.), under the supervision of Dr. A. M. Madaki and Dr. B. Babaji. The information derived from the literatures have been duly acknowledged in the text and a list of references provided. To the best of my knowledge, no part of this work has been presented for another Degree or Diploma at any instruction.

Aliyu ABDULLAHI

Date

CERTIFICATION

This LL.M thesis entitled: **A Comparative Analysis of Enforcement of Foreign Judgment in Nigeria and United Kingdom: A Case for Cyber – Jurisdiction** meets the regulation governing the award of the Degree of Master of Laws (LL. M.) by Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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Abstract

Under Private International Law, enforcement of foreign judgment or its recognition is the whole mark of every proceeding. Without them, this spare of law will make little or no sense at all and international transactions will suffer a setback. They serve as guarantee that an act adjudged wrong by the court of competent jurisdiction in one state will same effect in other state. This research work intends to make comparative analysis of the conditions and procedures of enforcing foreign judgment as well as making case for cyber jurisdiction. Using doctrinal method of research, the comparative analysis of the conditions and procedures of enforcing judgments in Nigeria and United Kingdom was conducted. The research work also makes case for determination of jurisdiction of court to preside over internet cases. The research finds that, the legal regime on the subject in Nigeria has limited scope compared to that of the United Kingdom and the fact that presently no effective solution for the challenge of cyber jurisdiction is achieved yet. The research recommends that, the minister in Nigeria should give effect to section 3 of the Foreign Judgment (Reciprocal Enforcement) Act Cap. F35 L. F. N .2004. The Hague Convention on Recognition and Enforcement of Foreign Judgments should be amended with the hope that, if these and other recommendations are adopted enforcement of judgment in both Nigeria and the United Kingdom will be guaranteed and simpler.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND OF THE STUDY

A wise saying has it that, no man is an island, hence human interaction becomes necessary. The dynamic nature of this social interaction being what is occasionally brings about disputes or disagreements. To mend these disputes or disagreements, civilized societies in a bid to make life meaningful put some instruments in place. One of such instruments is law.¹ By the instrumentality of law, an aggrieved party normally goes to court of competent jurisdiction² seeking for redress. One of the duties of court in this circumstance is to make order or declaration³ as per the rights and the duties of the parties involved.

The matter does not however end with the court pronouncing its judgment,⁴ recognition⁵ and enforcement⁶ of the court's judgment are the next procedures. Apart from declaratory judgments that are not enforceable,⁷ other forms of judgment⁸ may need some form of compliance or the other in order to be realized. Otherwise, the successful litigant, called the judgment creditor, may have secured a pyrrhic victory.

¹ Law is defined as "the whole prescriptive and authoritative rules of human conduct regarded as binding and made or consented to by the state, the breach of which sanction is imposed". See Suleiman, I. N. (1996) *The Nigerian Law Dictionary* 1st ed. p. 193

² Jurisdiction is defined as "a power of a court to judge a particular case". See Azinge, E. (2005) *Jurisdiction And Cyber Law Practice*. In: Azinge E. (Ed.) *Jurisprudence of Jurisdiction* Oliz Publisher, Abuja, Nigeria p.562

³ SS. 6(6)(b), 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended)

⁴ The Supreme Court of Nigeria defined judgment in *Saraki vs. Katoye* (1992) 9 NWLR (Pt. 264) 156 as a binding, authentic, official and judicial determination of the court in respect of claims and in an action before it.

⁵ Recognition means confirmation that an act done by another person was authorized and it is also formal admission that a person, entity or thing has a particular status. See Tony, A.I. (2011) *Recognition and Enforcement of Foreign Judgments in Nigeria*, Innovative Communication Lagos, p.16.

⁶ Means, the act of giving effect to the court's judgment or orders. See *Olojede vs. Olaleye* (2010) 4 NWLR (Pt. 1183) 18 C. A.

⁷ Ibid

⁸ For example, Executory judgments. Executory judgment simply means, the judgment that declares the respective rights and obligations of the parties and then proceeds to order the defendant to act or omit to act. Ibid

If the party against whom judgment is given, called the judgment debtor willingly complies with the terms of the judgment, there will be no problem. But more often than not, the judgment debtor does not willingly comply with the terms of the judgment. Thus, there arises the need to compel him to do so through execution or enforcement procedure. This conforms to the general principle of law that judgment or order of the court must as far as possible be obeyed or complied with. Otherwise the authority of the court would be diminished and the legal order would suffer a breakdown.⁹

Again, if the enforcement or execution is to be carried out, in the jurisdiction or country in which the judgment is given, no much problem would arise. But a much more challenging circumstance showcases itself where the judgment creditor only after his success in the case realizes that, the fruit of his labour has to be satisfied abroad.

The question is, can judgment given by the court of one country be enforced by the court of another? This necessitates the study of feasibility of enforcing foreign judgment. Enforcement of foreign judgment is not a new phenomenon. It has long existed as a topic in the sphere of private international law. Besides the Rule of Common law, it is regulated by bilateral treaties¹⁰ or multilateral international conventions.¹¹ This area of the law has gained prominence, at least of late, because of the advent of the internet and the age of globalization. Increase in cross border business transactions would naturally cause an upshot in litigation. This in turn would require national or municipal courts to decide whether a judgment or order obtained in a foreign country should be recognized or allowed to be enforced in their own country.

⁹Babalola, Afe (2003) *Enforcement of Judgment*, 1sted, Inter Printers Ltd, p. 1

¹⁰ For example, Foreign Judgment (Reciprocal Enforcement) Act Cap F35 L.F.N. 2004 and Foreign Judgment (Reciprocal Enforcement) Act 1933 of the United Kingdom.

¹¹ European Union Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention)

In Nigeria and the United Kingdom, it is well settled under both the common law and statutes¹² that the foreign judgment sought to be enforced must satisfy certain requirements as precondition to its enforcement or recognition. The most essential of all the requirements for recognizing or enforcing foreign judgment is that the foreign court which rendered the judgment sought to be enforced is one of competent jurisdiction in the international sense.¹³

Underscoring the importance of jurisdiction as a condition precedent to recognition and enforcement procedure, a writer¹⁴ states thus:

“In general, recognition or enforcement of foreign judgments may not be allowed if the foreign court acted without competent jurisdiction or if the defendant can avail himself of any of the limited number of defenses available”¹⁵

1.2 STATEMENT OF RESEARCH PROBLEM

Enforcement of foreign judgment has significant relevance in this era of increased international trade and foreign investment. Businessmen are more comfortable doing business with foreign partners knowing that if they obtain judgment from superior court in their home country; it can be enforced against the judgment debtor across borders.

This is what actually gave rise to conflict of laws as a course or private international law which is aim at making case for the enforcement of judgments obtain from one country in t another. The two counties that are the case study of this research work (Nigeria and the United Kingdom) have conditions or requirements a judgment must satisfy before its enforcement and the procedure of so doing which fall on all fours.

¹² Foreign Judgment (Reciprocal Enforcement) Act Cap F35 L.F.N. 2004 and the Foreign Judgment (Reciprocal Enforcement) Act 1933

¹³ Jurisdiction as a fundamental requirement to recognition and enforcement of foreign judgment is fully discussed in the whole of chapter three infra

¹⁴ AmbaMyss (1997) *Conflict of Laws*, (Lecture Notes). Butterworth, London p. 98

¹⁵ Discussion on such other defenses to is in Chapter three

It has been well settled that by international laws of the two countries that a judgment given by a court of one country may not be capable of recognition or enforcement in another, except if the court that gave the judgment is one of competent jurisdiction in international sense. Once jurisdiction is lacking, the judgment becomes nullity¹⁶

Today the bulk of transactions are conducted online and breaches are occasioned from these transactions which may necessitates going to court. Hence, the concept of cyber – jurisdiction emerges. Cyber – jurisdiction unlike the ordinary territorial jurisdiction is placeless.

The above facts made the two scenarios fall apart, such that what suits one cannot certainly suit the other. Consequently, some scholars¹⁷ see the regime of online transaction as an end to recognition and enforcement of foreign judgment. This skepticism is thought provoking that makes one to wonder whether these online transactions are not regulated by law such that breaches there from cannot be enforced.

The statement of problem of this research work is that, the traditional jurisdictional principle in Nigeria and the United Kingdom that is geographically based cannot suit the cyberspace scenario which is placeless and disrespects geographical boundaries. Thus, there is no agreement on when can a foreign court be of competent jurisdiction to entertain an online matter capable of recognition and enforcement in another country.

¹⁶Teleglob America Inc. vs. Century, (2008) 17 NWLR (pt 1115) at p.116

¹⁷ Dicey and Moris, (2000) *The Conflict of Laws*. Sweet and Maxwell Ltd, London, preface ph.3

1.3 AIM AND OBJECTIVES OF THE RESEARCH

The aim of this research work is to discuss the extant laws regulating recognition and enforcement of foreign judgments in Nigeria and the United Kingdom and since jurisdiction is the most important requirement for the recognition and enforcement of foreign judgment the research work looks at the relationship between recognition and enforcement of foreign judgment and cyber – jurisdiction as well as exploring the possible ways of addressing the challenge that cyber jurisdiction poses to recognition and enforcement. In particular, the research work aims at achieving the following objectives:

- i. To make a comparative analysis of the requirements and procedure for recognition and enforcement of foreign judgment in Nigeria and United Kingdom.
- ii. To critically explore how the challenge that the cyberspace poses to enforcement of foreign judgments could best be addressed so that internet users can transact with peace of mind.
- iii. To explore the possible relationship between the requirement for enforcement of foreign judgment and cyber-space.

1.4 JUSTIFICATION OF RESEARCH

As rightly pointed out above, no man can happily live in isolation. Therefore, interaction among people both at national and international level becomes inevitable. Today, technology has made this interaction easier, sometimes by a mere click of a computer mouse.

Sadly as it may sound, disputes are bound to arise from time to time owing to the dynamic nature of life. Absence of any mechanism to address the likely disputes may extinct online international transaction for the fear of likely breach of commercial relationship and other civil wrongs which may go unenforced.

This research work is therefore justified, because is targeted at ascertaining the competence of one of these redressing mechanisms that is, the court to decide over these disputes involving foreign elements (foreign element means foreign law or a foreigner) from online transactions, as well as the procedure to be followed in realizing the fruits of the litigant's labour and the likely defenses that can be raised thereto.

This will infuse life into this dying area of the law and instills confidence in the minds of foreigners (Nigeria and British citizens) to transact online freely knowing that for every breach there is a corresponding remedy.

1.5 SCOPE OF THE RESEARCH

The scope of this research work is basically Nigeria and the United Kingdom. Attention is placed particularly on the common law principles as they apply to these countries on the topic under consideration. The respective statutes of these two countries that is, Foreign Judgment (Reciprocal Enforcement) Acts of each and other related statutes are also examined with respect to the conditions and procedures of enforcement of foreign judgments as well as the position of cyber-jurisdiction.

1.6 RESEARCH METHODOLOGY

In carrying out this research, information were collected for an in depth analysis through doctrinal method of research that is through reading of books and other written materials such as statutes, cases, articles among others. Recourse was also be made to information stored online (the use of internet facility).

Information is collated form these sources for in-depth analysis with a view to finding out the present position of the law and possible contribution to expand the frontier of knowledge in this regard.

1.7 LITERATURE REVIEW

Recognition and enforcement of judgment is an aspect of private international law that attracted the attention of virtually all the renowned authors on the subject. Some authors have despite sporadic reference to recognition and enforcement of foreign judgment in various chapters also devoted a full chapter to it in their respective books. Perhaps because it is a prime topic, the whole mark of all private international proceedings. Under this head, a number of these books and other available literatures were reviewed to see especially their contributions on the aspect and the need for improvements.

Dicey and Morris,¹⁸ in their book, discussed extensively the requirements and procedure of recognition and enforcement of judgment involving foreign element both under the common law and statutes as they apply to cases in or out of England and the rest of the world. However, the book did not make any attempt to address the recent issue of cyber-jurisdiction¹⁹ and the challenge it poses to recognition and enforcement of foreign judgments. They did not discuss

¹⁸ Ibid

¹⁹ It is a term used to describe the power of the court to entertain legal issues relating to the use of communication, particularly “cyberspace” i.e., the internet. See Scout, B. C. (2010) Law in the Cyberspace. Accessed on 02 April, 2011 from <http://slideshow.net/ihsh/cyberlow>

post registration procedure and their discussion on defenses was scanty. Again, the work has not specifically related to the situation obtained in Nigeria.

Amba Myss²⁰ is an English writer. Although he discussed synoptically the applicable laws regulating jurisdiction, recognition and enforcement of judgment, he did not however dwell on defenses. Cyber-jurisdiction also falls outside the scope of his work.

Cheshire and North,²¹ took pain to discuss extensively the principles of jurisdiction as prerequisite to a valid judgment capable of recognition or enforcement under different heads namely, jurisdiction *in personam*²² and jurisdiction *in rem*²³ under both common law and statutes. They further discussed limitations to those jurisdictional principles, and the defenses that can be raised against recognition or enforcement of foreign judgment. Like other writers, they did not discuss cyber-jurisdiction. Their work did not equally capture the recent trends on recognition or enforcement procedures, both forming the basis of this work.

Agbede²⁴ is one of the renowned authors in this area of law in Nigeria. His work substantially reflects the relevant laws applicable in Nigeria. He discussed choice of jurisdiction or inter-state situation, as well as jurisdiction *in rem* and *in personam*.

His discussion on the topic under consideration that is recognition and enforcement was minimal as he discussed only jurisdiction under the common law and statutes as a basis of recognition and enforcement of judgment. He did not have cyber-jurisdiction in contemplation, neither did he discussed defences against enforcement.

Kera, F. A.,²⁵ this is a work that substantially goes close to the topic under study. The writer dealt with the issue of jurisdiction and recognition as well as the enforcement

²⁰Op.cit p.

²¹Cheshire, G. C. and North, P. M. (1999) *Private International Law*. Oxford University Press, U.K.

²² Discussed in chapter two infra

²³ Discussed in chapter two infra

²⁴Agbede, I. O. (1989) *Themes on Conflict of Laws*, Sheneson Ltd Lagos

requirements. The writer recommends for further study on cyber jurisdiction. This forms the basis of this research work. This research is going to make immense contribution on this recent aspect thereby upgrading the frontier of knowledge in this regard.

Linus, A. H.²⁶ highlighted the threats that e-commerce is facing as a result of inadequate checkmating mechanisms such as inadequate regulatory framework that is legislations, equipped courts that are properly manned by Judges vast in the workings of computer technology or the internet. As the title of his articles says, the writer addresses only the crimes militating the flourishing of e-commerce especially in Nigeria and the United Kingdom and the need for proactive measures to curb this menace.

Oba, C. O.²⁷ devoted her article to two aspects of enforcement of foreign judgments only in Nigeria. The first is the powers conferred on the Attorney General and Minister of Justice to make an order stating the countries with which Nigeria has reciprocal arrangements. The second is with the conditions for the registration of a foreign judgment particularly on the conferment of jurisdiction on the original court by the voluntary appearance of the defendant.

The writer urged for pro-activeness by the Minister to exercise the powers vested on him by S.3 of the Foreign Judgment (Reciprocal Enforcement) Act.²⁸ And the need for amending the provision of S.6(2)(a)(ii)²⁹ both with a view to laying a good ground for promoting foreign investments in Nigeria.

²⁵ Farida, A. K. (2009) Recognition and Enforcement of Foreign Judgment under Private International Law. Unpublished LL.M. Thesis Faculty of Law, ABU Zaria

²⁶ Linus, A. H. (2006/2007) "Business Alert: Cybernetic Crimes, A Threat to Global Commercial Transactions". *Ahmadu Bello University Journal of Commercial Law*, Faith Printers, Zaria

²⁷ Oba, C. O. (2011) "The Legal Regime for the Enforcement of Foreign Judgments in Nigeria: A Promotion or Impediment to Foreign Investments"? In: Adoke, M. B. (Ed) *The Justice Journal*, Federal Ministry of Justice, Abuja

²⁸ Cap F35 L.F.N. 2004

²⁹ Ibid

Ekpeyong, E.³⁰ commences his discussion on the subject by stressing the importance of foreign judgment in an era of increase trade and foreign investment. Businessmen are more comfortable doing business with foreigners knowing that if they obtain judgment from a superior court in their home country; it can be enforced against the judgment debtor across borders.

He called for pro activeness on the part of the minister to give effect to the provision of section 3 of the Foreign Judgment (Reciprocal Enforcement) Act mandating him to extend the provisions of the Act to certain countries as a condition to the applicability of the Act. He submits the failure of the minister so act throws uncertainty in trans-border businesses in Nigeria.

He also called for the review of the section of the Act prohibiting the enforcement of judgments on taxes or other penalties of a like nature. Insisting that review the provision highlights the importance of cross border tax collection. Nigeria will gain more if it offers herself and other states the opportunity to recover fines, taxes and penalties against evading offenders by either amending her foreign judgment statutes to accord foreign judgment on fines, taxes and penalties the same status with monetary judgments or enter into bilateral multilateral treaties with other states to assist themselves on cross border fines, taxes and penalties.

Globe, S.³¹ in his article discussed the procedure for registration of foreign judgment in England. By English law, judgments coming into England from any of the European country is enforced on a particular rule of procedure called European Judgment – Regulation (EU) 12/5/12 of the European Parliament and of the Council of 12, December,2012 on Jurisdiction,

³⁰Ekpeyong, E. (2014) Nigeria: An Appraisal of Challenges of Enforcing Foreign Judgments in Nigeria. Retrieved July 26,2015fromwww.mondaq.com/Nigeria/x/322886/international+trade+investment/an+appraisal+of+challenge+of+foreign+judgments+in+Nigeria. At 2:00pm

³¹Enforcement of Foreign Judgments in England. Retrieved July 26,2015 from www.loble.co.uk/enforcement_of_foreign_judgments.html. At 2:30pm

Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation).

While judgments of Commonwealth states and states with which England has a bilateral treaty are enforced through different sets of laws. He went further to discuss requirements of enforcing these judgments both under those statutes and common law.

Olaniyan, A. H.³² reviewed the judicial and legislative approaches of Nigeria to discretionary jurisdiction over foreign causes. He criticized the writ rule which permits suits to be maintained against person who has no other connection with Nigerian forum apart from their transient present here. He submits that, the rule makes it easy for a vindictive plaintiff to seek justice mixed with embracement against a helpless defendant. He discussed the three grounds upon which a court may decline to assume jurisdiction at common law under the writ rule which is otherwise mandatory. The grounds could be any of the followings; the ground of a successful plea of forum non-convenience, the ground of a contractual ouster of court jurisdiction and upon a successful plea of *lis alibi pendes*.

His discussion on the topic is limited to only personal jurisdiction as a basis to recognition and enforcement of foreign judgments leaving out other requirements to recognition and enforcement of foreign judgments which is intended to be covered by this research work.

Omoaka, G.³³ wrote on the legal regime for the enforcement of foreign judgments in Nigeria. Therein, he noted the fact that in Nigeria there are two legislations regulating the foreign judgments that are meant to be enforced in Nigeria. He also noted the fact that, there is confusion

³²Olaniyan, A. H. (2012) A Review Of Judicial And Legislative Approaches Of Nigeria To Discretionary Jurisdiction Over Foreign Causes. *International Journal of Business and Social Sciences*. Vol. 3 NO.12 pp. 204-217

³³Omoaka, G. (2004) Nigeria: Legal Regime for the Enforcement of Foreign Judgments in Nigeria. Retrieved July 26, 2015 from www.templar-law.com/media/publications/enforcementofforeignjudgment.

as to which of these legislations is applicable or the two legislations are applicable at the same time.

He discussed the conditions that a foreign judgment seeking enforcement in Nigeria must satisfy. Such conditions include the fact that, the judgment must be final and conclusive between the parties thereto, it must be a judgment for a definite sum of money in favour of a successful party and the judgment was delivered by a court of competent jurisdiction. He made emphasis on the importance of jurisdictional requirement. He discussed the requirements of assuming personal jurisdiction over a foreign defendant. He also stated the requirements of assuming jurisdiction on foreign properties, both movables and immovable.

He rounded up his discussion on the subject by discussing the defences a defendant can raise against enforcement of a foreign judgment. If such defence is successful no enforcement can be executed against him and the judgment becomes a nullity.

Wallace, P.³⁴ titled his article, the Enforcement of Foreign Judgment under Nigerian Laws. While discussing this title, the author focuses on his attention on the following major sub-heads: Enforcement of Foreign Judgments under the Ordinance wherein the author stated the countries or colonies to which the Nigerian Ordinance on the subject applies. In the next sub-head, the author noted that in the Ordinance the period within which an application for registration should be made is 12 months after the date of the judgment or such longer period as the court may permit. The succeeding sub-head is about the fact that the Ordinance comes into play only when the judgment seeking enforcement is a monetary judgment on a definite sum.

³⁴Wallace, PS. (2014) Enforcement of Foreign Judgment Under Nigerian Law. Retrieved from www.elexica.com/service/createsinglepdf.ashx?url=/en/legal-topics/dispute-resolution-commercial/25-enforcement-of-foreign-judgments-under-nigeria-law&name=enforcement-of-foreign-judgment-under-nigeria-law. At 3:0pm

The author discussed grounds of refusing to enforce the judgment under the Ordinance. He stated the provisions of section 3(2)³⁵ which provides for such grounds. He concluded his discussion under the Ordinance by highlighting the unfortunate consequences of section 3 (2),(b) as demonstrated by the case of *Grosvenor Casinos Ltd vs. GhassanHoloui*.³⁶

The second part of his discussion was on the 1961 Act³⁷ and its provision as another legislation regulating the subject matter in Nigeria. The discussion of this part is in the same order the author discusses the provisions of the Ordinance above. The author did not however make the English provision equivalent to what is obtained in both the Ordinance and the Act the scope of his work.

Gbenga, B.³⁸ centers his discussion on the uncertain features of the Nigerian legislation on foreign judgment enforcement procedure that require utmost caution (*ex abundaticautela*) whenever a foreign judgment is sought to be enforced in Nigeria. He argued that, the uncertainty stems from the failure or negligence of the Attorney General and Minister of Justice to give effect to the provision of section 3 of the Foreign Judgment (Reciprocal Enforcement) Act³⁹ that mandates him to designate countries to which part one of the Act applies. This failure or negligence of the Hon. Minister to so act leads to contradictory and conflicting decisions even by the Supreme Court hence the need for serious caution by any person seeking to register foreign judgment for enforcement in Nigeria.

³⁵1922 Cap. 175 Laws of the Federation and Lagos, 1958.

³⁶(2009) 10 NWLR (pt 1149) 309 26.

³⁷ Cap. F35 L.F.N. 2004.

³⁸Gbenga, B. (2014) Enforcing Foreign Judgments in Nigeria: Truly '*ex-abundaticautela*'. Retrieved July 26, 2015 from www.nigerianvillegesquire.com/articles/enforcing_foreign_judgment_in_nigeria_ex-abundati_cautela.html

³⁹ Cap. F35 L.F.N. 2004.

His discussion centers squarely on the statutory provisions on enforcing foreign judgment in Nigeria without making reference to the provision of common law on the matter. He did not equally consider the provisions of other countries like the United Kingdom on the matter.

Paige, B.R.⁴⁰ undertook comparative study on foreign judgment enforcement procedure between the England and the United States of America. He commenced by examining the applicable laws in this regard. He noted the fact that unlike the United States, the England has up to five legislations regulating the enforcement foreign judgment procedure depending on which part of the world the judgment is coming from. The United States has no federal legislation on the subject leaving each state to enact its own. However there is an ongoing effort in the United States to produce a federal legislation applicable across the whole of the country. In addition to the use of legislations, the two countries also use common law rules though differently. He submitted that, the procedure is more simple and comprehensive in England than in the United States.

The author's comparison was between the England and the United States which does not include Nigeria. Determination of jurisdiction in the cyberspace as a condition to producing a valid judgment cable of enforcement abroad was not part his discussion.

Tony, A.I.⁴¹ authored book titled, Recognition and Enforcement of Foreign Judgments in Nigeria. The book consist of ten chapters wherein he discussed the theories of recognition and enforcement of foreign judgments and the conditions thereto both under common law and statutes. While discussing the statutory provisions applicable in Nigeria, he took pain to look at

⁴⁰Paige, B.R. Foreign Judgment In America and England Courts: Comparative Analysis. Retrieved July 26,2015 from www.digitalscommons.law.seattleu.edu/cgi/viewcontent.cgi/articles=1757&content=sulr.

⁴¹ Tony, A.I. Op.cit

the relationship between the Foreign Judgment (Reciprocal Enforcement) Acts of 1958 and 1961⁴². He discussed the defences that a judgment debtor can raise against judgment sought to be enforced upon him before finally addressing the issue of enforcing arbitral awards.

Brook, C.⁴³ devotes attention to discussing the enforcement of foreign judgments in the United Kingdom. In so doing, her book looks at the eight ways a foreign judgment creditor can follow to enforce his victory in England depending on which part of the world he is coming from. The first is when the judgment to be enforced is coming into England and Wales from another part of the United Kingdom. The second is when the judgment to be enforced is coming into England and Wales from another part of the European Union. The third is when the judgment to be enforced is coming into England and Wales from another country with which England and Wales have a reciprocal treaty. The fourth is when the judgment to be enforced is coming into England and Wales from another country with which England and Wales have no reciprocal treaty. The fifth is when the judgment to be enforced is an outgoing judgment from England and Wales to another part of the United Kingdom. The sixth is when the judgment to be enforced is an outgoing judgment from England and Wales to another country within the European Union. The seventh is when the judgment to be enforced is an outgoing judgment from England and Wales to another with which England and Wales have reciprocal treaty. The eighth is when the judgment to be enforced is an outgoing judgment from England and Wales to another country with which England and Wales have no reciprocal treaty.

⁴² Cap. 175 Laws of the Federation and Lagos 1958; Cap.F35 L.F.N. 2004

⁴³ Brook, C. (2007) *Enforcement of a Judgment*. Thomas Sweet and Maxwell Ltd. London.

Graveson, R. H.⁴⁴ is one of the early authors on the subject. In his book, he discussed virtually all the major topics of private international law or the conflict of laws. The other authors, enforcement of foreign judgments and arbitral awards form the last part of his book. While discussing enforcement of foreign judgment, the author submitted that, judgment can be enforced in two ways to wit, by action and registration. He went ahead to discuss the requirements and procedure of going about each of them.

Like virtually all other write his book did not discuss cyber jurisdiction as a condition precedent to enforcing judgments emanating from online transactions. It may be because the book free dates the use of internet.

This research work intends to carry further the mission of the above writers with a view to promoting foreign investment which today forms substantial portion of commerce and investment globally. This is only possible when the international business community feel safe to use the cyberspace in addition to or as an alternative to the physical space by addressing the need for recognizing and enforcing online transactions.

1.8 ORGANIZATIONAL LAYOUT

Chapter one of this work, introduces generally the topic of the research, the problem that the research wishes to address which are not largely taken care of by other authors. The works of those authors were reviewed to find out the areas they were silent on or no much emphasis was made. The methodology of conducting this research work is also stated.

Chapter two makes effort to clarify the key terms that make up the topic of this research work in order to aid the reader to appreciate what the topic stands for and what it seeks to

⁴⁴ Graveson, R. H. (1969) *The Conflict of Laws* London, Sweet and Maxwell.

achieve. Terms like the concept of foreign judgments, enforcement of foreign judgments and concept of jurisdiction as well as cyber-jurisdiction of court are clarified. In making these clarifications, the chapter makes reference to the provisions of the common law, the statutes of the two countries that are the case study of this research work and respective courts pronouncements.

Chapter three is all about the conditions and procedures to recognition and enforcement of foreign judgments coming from United Kingdom to Nigeria or out of Nigeria to the United Kingdom both under the common law and statutes (reciprocal treaties). It draws a distinction between what recognition of foreign judgment is from its enforcement. What is effect of the registering a judgment for enforcement under statutes and the post registration procedures are all examined. The chapter concludes by reviewing the limited number of defences available to the judgment debtor against enforcement of a foreign judgment. If the defense succeeds, the judgment becomes unenforceable.

Chapter four examines the models develop on determining when can a court be competent to preside over matters coming from online transactions. The models are considered under heads like, the use of long arm statutes, and the use of case law for personal jurisdiction. A review of the cases decided using the models so far was also made.

Chapter five concludes the research work. Here, a summary of the whole work is made and thereafter findings are stated and recommendations are put forward.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF KEY TERMS

2.1 INTRODUCTION

The title of this research work consists of some key terms which in legal parlance may not be considered technical or difficult to understand. However, the researcher feels clarifying these terms will go a long way in helping the reader to appreciate what the title seeks to achieve. Below, is an attempt to clarify the key terms that make up the title in a simple and most explicit language which are the concept of foreign judgment, the concept of enforcement and the concept of cyber - jurisdiction.

2.2 FOREIGN JUDGMENT

To understand what a foreign judgment is capable of enforcement in the country other than a country in which it is pronounced means, it is important to attempt looking at it within the provisions of the statutes that regulate enforcement of foreign judgments in the two countries that are the case study of this research work. The statutes define judgments in their respective interpretation sections. The 'judgment' defined in these sections are not qualified with the word 'foreign' to denote the fact that, they are coming from another country for enforcement. Hence the definitions cannot be distinguished from those of domestic judgment

Section 11¹ of the English provision, defines judgment as, "means a judgment or order given or made by a court in any civil proceedings or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party".

¹Foreign Judgment (Reciprocal Enforcement) Act 1933. (herein after called the 1933 Act)

The definitions of Nigerian legislation and that of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil Matters are more elaborate than the above.

Section 2² of the Nigerian legislation provides:

‘judgment’ means a judgment or order given or made by a court in any civil proceedings and shall include award in an arbitration if the award has pursuant of the law in force in the place where it was made become enforceable in the same manner as a judgment given by a court in that place, or a judgment or order given or made by a court in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

This definition differs from the one given by section 11 of the English legislation because it is wide enough to include arbitral awards if the award can be enforced in the same manner as a judgment is enforced where it was made. In the case of *Tulip (Nigeria) Ltd vs. N. T. M. S. A.*³ the court said for an arbitral award to be enforced like a judgment in Nigeria, the award debtor is required to have applied and obtained leave of the court in the country where the award was made to enforce the award in the same manner as a judgment of that court. This marks a very important difference between the Nigerian laws and the English laws as to what constitutes a foreign judgment capable of enforcement in respective countries. Whereas Nigerian laws accord foreign awards the status of a foreign judgment and enforce in the same manner, the English law is silent. The position adopted by the Nigerian law is better in line with the recent commercial trends that normally end in arbitral proceedings. This gives confidence to foreigners trading with Nigerians that an award in their favour is enforceable like a judgment.

The Hague Convention⁴ adopts a different style in its definition; it says judgment means “decision given by the courts of a contracting state, irrespective of the name given by that state to

² Foreign Judgment (Reciprocal Enforcement) Act Cap. F.35 L.F.N. 2004.

³ (2011) 4 NWLR (Pt. 1237) p. 254

⁴ Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil Matters 1971

the proceedings which gave rise to the decision itself such as judgment, order or writ of execution.” This definition made it clear that, a judgment is a judgment by whatever name called whether it is called ‘order’, ‘decision’, ‘decree’, or ‘award’ in the rendering state.

American definition is straight forward on what foreign judgment is. While defining it, section 1⁵ expressly tagged it as ‘foreign judgment’ which nomenclature was not used by the laws of Nigeria and the United Kingdom. The section defines ‘foreign judgment’ as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”

As if responding to a question of what a foreign state in the above definition means, subsection one further went ahead to define what a ‘foreign state’ as used in the above definition means. Foreign state from which a judgment should come to United States for enforcement means “any governmental unit other than the United States, or any state, district, commonwealth, territory, insular, possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu island”. From these definitions quoted above it is obvious that a foreign judgment as used under private international law is a judgment that comes from another state or political unit other than the state in which it is pronounced.

If a foreign judgment seeking enforcement by whatever name called is found to meet the requirements or conditions precedent to the enforcement of foreign judgment discussed in this research work, the finding renders the foreign judgment enforceable in the same manner the judgment of the forcing court is normally enforced⁶ except some circumstances that may lead to

⁵ Uniform Foreign Money – Judgment Recognition Act 1962.

⁶Paige , B.R. (2003) Foreign Judgments in America and England Court: A Comparative Analysis. Retrieved from digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1757&content=sulr.

setting aside the registration or entire enforcement procedure surface in which case the foreign judgment may be denied enforcement.

2.3 ENFORCEMENT OF FOREIGN JUDGMENT

Enforcement of foreign judgment has significant relevant in this era of increased international trade and foreign investment. Businessmen are more comfortable doing business with foreign partners knowing that if they obtain judgment from superior court in their home country; it can be enforced against the judgment debtor across borders⁷. Enforcement is the last stage of the judicial process after legal right, claim or interest has been converted into a judgment or order which remains to be enforced. Therefore a party who has successfully obtained a final order or signed judgment against another has only won the first round of the fight⁸. The final and most important round is the enforcement procedure.

Consequently, enforcement is defined as the term that “is used to denote the final process in the suit whereby the winning party (the judgment creditor) reaps the benefit of the judgment in his favour by taking possession of anything adjudged to be belonging to him by the court.” “It is a collective term used to mean all available methods for enforcing judgment.”⁹ The statutes do not use the term ‘enforcement’ in their respective interpretation sections. The term used by the statutes is ‘execution’ of foreign judgment which is mostly used interchangeably with enforcement. The statutes define ‘execution’ to mean “the act or process of complying with a law, mandate, command, decree or agreement.”¹⁰

⁷Ekpenyong, E. (2014) Nigeria: An Appraisal of Challenges of Enforcing Foreign Judgments in Nigeria. Retrieved from www.mondaq.com/nigeria/x/322886/international+trade+investment/an+appraisal+of+challenges+of+enforcing+foreign+judgments+in+nigeria. On 25/08/15 at 3:00pm p.1

⁸Babalola, A. (2003) *Enforcement of Judgments*intec printers limited.Ibadan.Nigeria. p.1

⁹Afolayan, A. F. and Okorie, P. C. (2007) *Modern Civil Procedure Law*. Dee-Sage Nigeria limited. Lagos. Nigeria.

¹⁰ S.2 of the 1962 Act

The overriding function of the judicial process of enforcement is to provide for the judgment creditor the fruits of his labour (the judgment), to obtain for him due satisfaction, compensation, restitution, performance or compliance which the court has granted by way of remedy or relief. This will conform with the general principle of enforcement, that the judgment or the order of the court must, so far as possible be obeyed or complied with, for otherwise the authority of the court will be diminished and the legal order will suffer a breakdown¹¹.

Every judgment of the court must be obeyed and is effective from the date of its delivery or from such a date as the judgment itself appoints. The judgment is meant to be obeyed without demand and if there is default in obedience, after a period of grace which can be between three to fourteen days as the rules may prescribe, the judgment creditor is expected to commence enforcement proceedings¹².

For example, a judgment may require payment by one person to another or into court of a sum of money or it may require a person to do or abstain from doing a particular act or acts. The successful party is therefore expected to secure the benefits of his success in the litigation. But, the judgment debtor may not be willing to voluntarily comply. This brings the need for the judgment to be enforced. The overriding function of the judicial process of enforcement is to provide for the judgment creditor the fruits of the judgment, by compelling the judgment debtor one way or the other to do the needful.

Is not every judgment that requires enforcement proffer, some judgments require recognition other than enforcement. To make this point more glaring, it may not be out of place

¹¹Babalola, A. op.cit p.1

¹² Ibid p.6

here, to cite examples of judgments that don't require enforcement proper but recognition. Some of these examples are:

Firstly, a claimant, who has been successful in foreign proceedings – but less successful than he might have hoped, wishes to relitigate the same cause action in Nigeria, the defendant may rely on the foreign judgment as a bar to the Nigerian proceedings.¹³

Secondly, a judgment creditor may wish to raise issues estoppel as a means of limiting the grounds on which the judgment debtor may challenge enforcement of a foreign judgment. For example, in a suit that raises two issues for determination and both resolved in “A’s” favour against “B”, and “B” sought to relitigate one of this issues against “A” in another country, “A” can urge the court to recognize the earlier judgment in which the issue was settled as binding between the parties.

Finally but by no means the least, is a declaratory judgment which does not require any enforcement but recognition at best. Thus, a judgment creditor in whose favour a judgment was pronounced may not plead it for enforcement but recognition of same.

As earlier noted, the process of enforcement is at the initiative of the successful party. The adversarial system operates in relation to the enforcement of judgment as it does before judgment. It is for the successful party to activate the judicial process of enforcement, and it is for him to take appropriate steps to enforce his judgment, by the applicable mode and at the time and on the terms of his own choosing. Conversely, the court has no power and no machinery to act on its own motion to enforce, still less the police, its own judgment¹⁴.

¹³Teleglobe America Inc. v. 21st Century Techni.Ltd (supra).

¹⁴ Ibid.

Every process of enforcement constitutes a fresh, separate, independent proceeding to give effect to the judgment or order of the court. Proceeding for enforcement can be initiated via different ways depending on the nature of the subject matter to be enforced.

2.4 THE CONCEPT OF JURISDICTION

Jurisdiction falls among the legal concepts that seem to defy any comprehensive definition. As defiant to a comprehensive definition as the concept of jurisdiction is, attempts were made at defining it by the courts and writers alike because of its importance in every court proceeding. It is the threshold issue, the legal basis upon which the court sits and determines a matter brought before it. Thus a judgment given without jurisdiction is an absolute nullity and unenforceable¹⁵. In *Okpelauzuegbu vs. Ezemenari*¹⁶ the court defined jurisdiction as:

The legal authority which a court must have to decide matters that are litigated before it; or to take cognizance of matters presented in a formal way for its decision. The limits of the legal power or authority are circumscribed by the statute or Act under which the court is constituted and may only be expanded or restricted by similar means.

Umozurike¹⁷ defined jurisdiction as the authority a state exercises over natural and juristic persons and properties within it. He further added that jurisdiction concerns mostly the exercise of power on state territory or quasi-territory, but noted that some states exercise a measure of jurisdiction extraterritorially especially when acts performed within or outside the territory or quasi-territory have harmful consequences therein.

¹⁵*Majokudimi vs. Nkemdilim* (1962) 1 All NLR (Pt. 2) p. 581

¹⁶(2011) 14 NWLR (Pt. 1268) 492

¹⁷Umozurike, U. O. (1993) *Introduction to International Law*. Spectrum Books Limited, Ibadan, p.8

Looking at the above definitions, Gasiokwu¹⁸ submitted that the following attributes are discernible:

- a. it is the power of a state to govern persons (both natural and juristic) and property by its municipal law.
- b. it includes power to prescribe rules and the power to enforce them.
- c. the power of a state to so govern, legislate and enforce is a manifestation of states' sovereignty, independence and equality with others. This is known as the principle of absolute state sovereignty.

This principle of absolute state sovereignty does not however prevent other countries from recognizing and enforcing judgment from another country provided the court that delivers it is competent to do so. It is in this light that Black's Law Dictionary defines jurisdiction as a government general power to exercise authority over all persons and things within its territory especially a state power to create interest that will be recognized as valid in other states.¹⁹

In the same vein, Agbede²⁰ while discussing international jurisdiction said, is the power of state to create or affects legal interest which will be recognized as valid in another state.

In the spare of private international law²¹, the original court²² must have international jurisdiction to decide a matter otherwise its judgment becomes nullity and cannot be enforced in other countries²³

¹⁸Gasiokwu, M.O.U. (2005). Jurisdiction in International Law. In: Azinge, E. (Ed) *Jurisprudence of Jurisdiction*, Oliz Publisher, Abuja, pp.438

¹⁹ Garner, B.A. (2004) *Black's law Dictionary*, 8th edition. Thomas West U.S.A. p. 867

²⁰Agbede, I. O. (2001) *Themes on Conflict of Laws* Ahaneson, C. I. Limited, Akoka – Lagos @ p. 238

²¹ Is defined as that field of law which comes into play in a matter involving foreign element (foreign element means foreign law or a foreigner). See Amba, M. (1997) *Conflict of Laws, (Lecture Notes)*. Butterworth, London 2nd Edition p. 65

²² In relation to any judgment means the court by which the judgment was given. See S. 2 of the Foreign Judgment (Reciprocal Enforcement) Act Cap F 35 L.F.N. 2004

²³ Telelobe America Inc. Century Techni Ltd (supra)

In the same vein, Agbede, I.O.²⁴ defines international jurisdiction to mean: “A court’s power to hear and determine matters between different countries or persons of different countries”.

One can safely submit that, for the purposes of private international law, one can safely say, the importance of jurisdiction is twofold. Firstly, it relates to the court’s power to decide a case before it. Secondly, it is important for extra-territorial recognition and enforcement.²⁵

Jurisdiction should be determined at the earliest opportunity. This is because, if a court has no jurisdiction to hear and determine a case, the proceeding remain a nullity *ab initio* no matter how well conducted and decided. A defect in compliance is not only intrinsic, but also extrinsic to the entire process of adjudication²⁶.

It is important at this juncture to attempt defining cyber- jurisdiction. Cyber-jurisdiction is jurisdiction in cyberspace. Jurisdiction was earlier defined above. Cyberspace is a place – where men relate through the intercession of an internet provider. It is a place where messages and web pages are posted for everyone in the world to see, if they can find them. The American Supreme Court opined that, cyberspace is a legal metaphor, which means a place outside national boundaries²⁷.

In essence, cyber-jurisdiction is the competence of a court to preside over cases emanating from the cyberspace which is virtual or imaginary unlike the physical space that is visible and definite. Attempts to give cyber-jurisdiction meaning and spelling out conditions upon which a court can be competent to decide matters from the cyberspace has in recent time, becomes part of private international law jurisprudence.

²⁴Agbede, I. O. (1989) *Themes on Conflict of Laws*, Shaneson, C. I. Ltd, Ibadan, p238.

²⁵ Ibid

²⁶ Braithwaite vs. Sanni (2013) 5 NWLR (Pt. 1346) p. 7

²⁷ Darrel, M. Jurisdiction in Cyberspace: A Theory of International Spaces. Mich. Telecomm. Tech. L. Rev. 69 (1998) pp.1-2 retrieved from, <http://www.mttl.org/volfour/menthe.html>.

Intercourse between law and technology has always resulted in an easy liaison.

Commenting on this scenario, Darrel Menthe²⁸ captured it the following words:

In cyberspace, jurisdiction is the overriding conceptual problem for domestic and foreign courts alike. Unless it is conceived of as an international space, cyberspace takes all of the traditional principles of conflict of law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three or more conflicting jurisdiction, the set of laws which could apply to a simple homespun webpage is all of them. Jurisdiction, in cyberspace requires clear principles rooted in international law...

Finally, Chapter four of this research work centers mainly on effort by the courts in their bid to find out grounds upon which a court can entertain matters emanating from transactions in the cyberspace. The models so far used by the courts are examined together with some cases decided using those models.

2.5 CONCLUSION

In conclusion, this chapter clarifies the major concepts that make of the topic of this research work. These major concepts are, foreign judgment, enforcement of judgment, jurisdiction and cyber – jurisdiction. This is with a view to laying foundation for richer understanding of the content and intent of this research work.

CHAPTER THREE
ENFORCEMENT OF FOREIGN JUDGMENTS: CONDITIONS AND
PROCEDURES.

3.1 INTRODUCTION

Enforcement of judgment by a court other than the court from which the judgment emanates is a trickish procedure. It is even more trickish when the judgment is to be enforced abroad. That is why under private international law, certain conditions are placed for a judgment seeking enforcement abroad must satisfy before it is enforced.

This chapter discusses the conditions that a foreign judgment sought to be enforced in Nigeria or the United Kingdom must satisfy. The chapter also discusses the procedures through which a judgment can be enforced in Nigeria and the United Kingdom. The procedures are either through the common law or the use of statutes. For an orderly presentation, the conditions for enforcement under the laws of these two countries are discussed first, then discussion on the procedure followed.

3.2 ENFORCEMENT OF FOREIGN JUDGMENT IN NIGERIA AND UNITED
KINGDOM.

There are two ways via which a foreign judgment can be enforced in Nigeria or the United Kingdom. These two ways are under the common law or under the statute.¹ Each of these is discussed below.

¹Efevewerham, D. I. (2013) *Principles of Civil Procedure in Nigeria 2nd*, Snaap Press, ITD Enugu, Enugu State, p.393

3.2.1 Enforcement under Common Law

Generally speaking, at common law, only the judgment of a superior court (courts equivalent to high court) will be enforced in courts of another country of the Commonwealth. The judgment may be enforced irrespective of whether or not there is a reciprocal enforcement arrangement between the country of the original court and that of the enforcing court. For the judgment to be enforced the following requirements must be satisfied.

3.2.1.1 Conditions of Enforcement:

- (a) The court that delivers the judgment must be court of competent jurisdiction;
- (b) The judgment must be final and conclusive;
- (c) The judgment must be for a definite sum of money, provided that it is not money recoverable as tax, fine or penalty; and
- (d) if the judgment is for a res other than money, the res must have been situate at the jurisdiction of the foreign court that gave the judgment, as at the time of delivery.²

Before going ahead to discuss each of the above listed conditions, two things need to be made clear by way of preliminary points at this stage as follows:

Firstly, although under this sub-head, reference to English court will be frequent, it is submitted that, the principles of law discuss here under apply to Nigeria as well by virtue of S.32 of the Interpretation Act³ which received for Nigeria the principles of common law except where there is a local legislation to the contrary. Such local legislations if any will be noted and discussed as one of the areas of differences in the course of this work.

²Peenok Ltd v Hotel Presidential Ltd (1982) 12 SCI

³ Cap I 28 L.F.N., 2004, Ibidapo vs. Lufthansa Airlines (1994) 8 NWLR (pt 362) 355

Secondly, determination of jurisdiction is a procedural issue which is governed by the laws of the forum (forum means the country of the court that decided the matter). The reason is simple. Under private international law, the substantive right of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the laws of the forum. Thus, in common law countries (unless local legislations are made the contrary) it is common law rules that will be used to determine whether a foreign court has jurisdiction in a matter involving foreign elements.⁴

- (a) The court that delivers the judgment must be court of competent jurisdiction over the foreign defendant. In private international law parlance, this is technically referred to as jurisdiction *in personam*. The condition is discussed below.

Jurisdiction *in personam*, is a fusion of two words, namely 'jurisdiction' which was earlier defined and '*in personam*'. We will now look at *in personam* separately before joining the two words together and consider what they stand for.

*In personam*⁵, is a Latin word which literally means "against a person" rather than a thing or a property. For example, when one says an action or proceedings *in personam*, one simply means an action or proceedings against the personal rights or liabilities of a person natural or juristic rather than against a thing or property. Thus, jurisdiction *in personam* is technically used in private international law to mean the power of a court to sit and determine an action brought before it against the personal rights and liabilities of a person.

To decide whether the foreign court is one of competent jurisdiction to entertain an action *in personam* at common law, some rules were developed in the 19th century and were restated in

⁴ Cheshire, G. C. & North, P. M. (1999) Private International Law, Oxford University Press UK, p.181

⁵ Garner, (2004) Black's Law Dictionary, 8ed. Thomson West, USA p.807

the frequently cited judgment of Buckly L. J. in *Emmanuel vs. Symon*.⁶ The learned law lord who spoke for the court, stated thus:

In an action in personam, there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began (3) where the defendant in the character of the plaintiff has selected the forum in which he was afterward sued (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

Buckly L. J., after stating the above rules, did not even by way of an *obiter* make attempt to discuss their meaning or give instances of their applicability. Nonetheless attempt is made below to critically look at them one by one in the light of decided cases on each if any.

Rule one: where the defendant is a subject of the foreign country in which the judgment has been obtained. The operative word used in rule one is ‘subject’ of the foreign country, Dicey and Morris⁷ submitted that, a defendant can be subject of the foreign country most likely in two ways only. Firstly, if he is a citizen of that country. Secondly, he temporarily finds himself in the foreign country and bound to obey its law. Only the first possibility will be considered under this rule, the second will be delayed / differed to rule two.

If ‘subject’ as used in rule one is taken to be synonymous with a ‘citizen’ of the foreign country, Dicey and Moris⁸ submitted that citizenship is quite inappropriate a basis of jurisdiction for the following reasons:

- (a) An action can be commenced against a defendant in his home country for a wrong committed elsewhere and none of the operative facts or elements is committed in the

⁶Supra ;Barsoum vs. Clemessy International (1999) 12 NWLR (Pt. 632) 516.

⁷ Dicey and Morris Op.cit p. 500

⁸ Ibid

home country. The problem is that if jurisdiction is exercised on this premise, the judgment is bound to be set aside on the ground of forum non-convenience.

(b) If rule one is relied on to assume jurisdiction, the court must first of all ascertain the nationality of the defendant which will necessitate calling for evidence hence the need for another trial which is time consuming.

(c) Again nationality of a foreign defendant cannot be determined by the court of the forum. This is because it is the foreign law in this case that defines who a citizen is.

Rule two: where he was resident in the foreign country when the action began. Ordinarily, one assumes that, the word resident simply means a person who lives in particular place or has his home there, but cases decided on this rule interpreted ‘resident’ narrowly to mean mere ‘presence’ in the foreign country with or without intention to stay there no matter how short. Two cases decided by English court illustrate this point.

In *Carrick vs. Hancock*,⁹ one of the earliest cases on this point, the plaintiff was an Englishman domiciled in Sweden who had acted in Sweden as an agent on commission for the defendant, an Englishman. The defendant was served with Swedish proceedings during a short visit to Sweden and he subsequently defended the action. Accordingly, the case had a significant connection with Sweden and in any event the defendant had clearly submitted to the jurisdiction of the Sweden courts. But in an unreserved judgment Lord Russell of Kill Owen C. J. decided that the Sweden judgment was enforceable because of the defendant’s presence in Sweden, and “the question of the time the person was actually in the territory was wholly immaterial”.

The above decision was relied upon by the Court of Appeal (English) in *Adams vs. Cape Industries Plc.*¹⁰ supporting the principle that, the competence of a foreign court to summon the

⁹ (1895) 12 T.L.R 59

¹⁰ (1990) Ch. 433, p. 519

defendant before it depends on the physical presence of the defendant in the country concerned at the time of the suit. The court justified the above position in the following words;

So long as he (the defendant) remains physically present in that country, he has the benefit of its laws and must take the rough with the smooth by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of the country territorial jurisdiction over him under our rules of private international law

For a defendant to be amenable to the jurisdiction of the foreign court, he must be served with court's writ. Thus, the relevant time for his amenability is the time of serving the writ on him not the time of issuing the writ. Therefore a writ issued but not served is ineffective in this regard as soon as the defendant leaves jurisdiction.¹¹ However, once he is served with the court's writ the court is not rendered incompetent by his subsequent departure from the country.¹²

Service must be personal or by post or other means approved by the rules of the issuing court. Where individual does not have address or his address is unknown for service, the process may be left at his usual or last known residence or place of business with the leave of court¹³.

The researcher observed however that, under this rule both parties that is, the plaintiff and the defendant may suffer some difficulties or inconveniences respectively. For example, a plaintiff who desires to prosecute his claim against a defendant may be frustrated if the defendant leaves the country (jurisdiction) before service of writ on him, which means no jurisdiction can be exercised against him by the court of that country. Conversely, a transient defendant who is just passing through a foreign country can be served with its court's writ and make him amenable

¹¹ Para 6.2 Civil Procedure Rules 1998, (UK) cited by Cheshire, G. C. and North, P. M. OP.cit, p.286

¹² Ibid, p.287

¹³ Adams vs. Cape Industries Plc. (supra)

to its jurisdiction even though none of the factual circumstances creating the cause of action has connection with the foreign country.

The case of *Maherence of Baroda vs. Wildenstein*¹⁴ best illustrates the above point. In that case, the plaintiff, an Indian residing in France, brought an action in England against a defendant, an art expert also residing in France. The cause of action also arose in France. The writ was served on the defendant whilst he was in England on a day visit to Ascot races. Despite the defendant's objection to the English jurisdiction, the Court of Appeal held that he had been properly served and accordingly it had jurisdiction to hear the case.

The situation is not the same in Nigeria, because s. 6(a) (1)¹⁵ requires voluntary submission of the defendant to the jurisdiction of the foreign court before its judgment against him becomes valid otherwise than for the purposes of protesting jurisdiction. This is one of the areas that Nigerian local legislation altered the common law position. Hence Nigeria and the United Kingdom differ here. It is submitted that, the Nigerian position is better and more just. .

Happily, either of these inconveniences or anomalies highlighted above can be remedied within the confines of the law. For example, a prospective plaintiff whose prospective defendant quits jurisdiction to evade service of writ can still set the court in motion against defendant *vide* service outside jurisdiction.¹⁶ And a prospective defendant sued while on transit can apply for the judgment to be set aside on the ground of forum non-convenience.¹⁷

¹⁴(1972)2 Q.B. 283 C. A.

¹⁵ Cap. F35 L.F.N. 2004.

¹⁶ Service out of jurisdiction is a statutory remedy against the highlighted defect of this common law rule. It allows with the leave of court for service on the defendant abroad. It is provided for under Order II of the Civil Procedure Rule 1998 (UK); Oder 8 Rule 1 of the Kaduna State High Court (Civil Procedure) Rules 2007 contains similar provision.

¹⁷ Is yet another exception to the common law rule that once service is effected on a non-resident defendant within jurisdiction the is amenable to the jurisdiction of that court. By virtue of the doctrine, the court will decline jurisdiction on the ground that, the forum of the court is not convenient to determine the rights and obligations of the parties as none of the factual elements of the case occur in the forum.

The above writ rule also applies to corporate defendant. There seems to be no doubt that the corporation must have a fixed place of business within the jurisdiction of the foreign country and from which the corporation operates. The rules were set out by the Court of Appeal in *Adams vs. Cape Industries Plc*¹⁸ that:

(i) the corporation has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country, and for more than a minimal period of time has carried on its own business at, or from, such premises by its servants or agents (a branch office case); or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporations business in the other country at or from, some fixed place of business.

In relation to the second requirement, if the business is carried on by a representative, then the question whether, he has been carrying on the overseas business for the corporation or has been doing his own business will necessitate an examination. The court will look at his functions and all aspects of his relationship with the overseas corporation to make this finding.¹⁹

The last three rules stated by Buckley L. J.²⁰ all point to the defendant submitting himself to the jurisdiction of the foreign court. These rules are examined for better understanding of how they operate below:

Rule three: where the defendant in the character of the plaintiff has selected the forum in which he is afterward sued. Under this rule, the defendant will act in the character of the plaintiff when he sues as a claimant or he counter-claims after being sued by the plaintiff. In either case it is clear case of submission to the jurisdiction of the court. Thus, he cannot be heard complaining lack of jurisdiction after judgment against him is obtained.

¹⁸ Supra

¹⁹ AmbaMyssOp.cit, p.69

²⁰ Emmanuel vs. Symon (Supra)

Rule four: where the defendant voluntarily appears. The above rule can take the forms of the defendant acknowledging service but did not participate in the proceeding nor apply to the court for an order declaring that it had no jurisdiction over him or when he instructed his solicitor to accept service on his behalf.²¹ Equally, a defendant who appears before the court and pleads to the merit of the case without contesting the jurisdiction of the court has voluntarily submitted himself to the jurisdiction of the court. This rule rests on the simple principle that, a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction.²²

The same is the case, where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merit²³ or agrees to a consent order dismissing the claim and cross-claim;²⁴ or where he fails to appear in proceedings at the first instance but appeals on the merit.²⁵ If the defendant takes no part in the proceedings and allows judgment to go against him in default of appearance and later moves to set aside may be a voluntary appearance if it is based on non-jurisdictional grounds, even if the application is successful.²⁶

Rule five: where he has contracted to submit himself to the forum in which the judgment was obtained. Mostly, in contractual cases, the parties agree on the ways and manners of addressing grievances in case they arise during the currency of the contract and such ways and manners are reduced into writing in form of joint venture or other like contracting documents.

In circumstances such as the above, the defendant may select as part of the agreement the particular jurisdiction at which he may be sued in the event of a breach on his part. Alternatively,

²¹ Dicey and Morris, Op.cit, p.498

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

the plaintiff may be the one to select the court or jurisdiction in which he will initiate his suit should the defendant breach the contract and the defendant undertakes to submit to that jurisdiction. In either of these instances, what the court does is giving effect to the agreement of the parties which is binding on them.

A contractual submission to the jurisdiction of a particular court in a country is not in itself an agreement to submit to the jurisdiction of all courts of that country. The question is one of construction of the contractual clause.²⁷

It may be laid down as a general rule that, an agreement to submit to the jurisdiction of a foreign court must be expressed; it cannot be implied. But if the parties agreed either expressly or by implication, that their contract be governed by a particular foreign law, it follows that they agree to submit to the jurisdiction of the court which applies it.²⁸

An agreement to submit may also take the form of an agreement to accept service of process at a particular or designated address. Again, if the defendant agrees to submit to the jurisdiction of a foreign court and agrees or is deemed to agree to a particular method of service, it is immaterial at common law that he does not receive actual notice of the proceedings if service is effected in the manner agreed.²⁹

The other conditions to enforcement of judgments under common law which are: (b) the judgment must be final and conclusive; (c) the judgment must be for a definite sum of money, provided that it is not money recoverable as tax, fine or penalty, do not substantially differ from the conditions under statutes. Discussion on them is deferred to conditions of enforcement under the statutes to avoid repetition.

²⁷ Ibid, p.497

²⁸ AmbaMyssOp.cit, p.72

²⁹ Dunbee Ltd vs. Gileman & Co (Austria) Pty Ltd (1968) cited by AmbaMyssOp.cit, p.72

(d) if the judgment is for a res other than money, the res must have been situated at the jurisdiction of the foreign court that gave the judgment, as at the time of delivery. The condition is also on jurisdiction but this time on res which technically termed jurisdiction *in rem*. The condition is also discussed below.

For a better appreciation of what jurisdiction *in rem* is, it is important to start looking at the Latin word “*in rem*”. *In rem* simply means “against a thing”. It is also archaically termed “*impersonam*”.³⁰ For example when one says an action or proceedings *in rem* one simply means an action or proceedings against a thing or property rather than against a person.

Thus, jurisdiction *in rem* simply means a court’s power to adjudicate the right to a given piece of property, including the power to seize and hold it³¹. The general principle regulating or providing the basis for jurisdiction *in rem* provides:

A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given is immovable or movable property which was at the time of the proceedings situated in that country.³²

A careful reading of the above rule will show that, the basis of jurisdiction on any property or thing is its location in the country where the judgment is given as at the time the proceedings commenced. The rule also provides for the basis of jurisdiction of courts on both movables and immovables. Thus, the first task of the court in a private international law case when required to decide some questions of a proprietary or possessory nature is to decide whether the item or property which is the subject of the dispute is a movable or an immovable. The legal system that will be applicable to the case depends on this preliminary decision. Rights

³⁰ Garner, B. A. Op.cit, p.809

³¹ Rule 40 of Dicey and Morris Op.cit , p.508

³² *ibid*

over the immovables are governed by the law of the *situs*; rights over movables are not necessarily governed by that law.³³ The rule will now be discussed vis-à-vis the movables and immovables properties respectively.

jurisdiction on movables:

Movables in this sense mean *res* other than human or persons (*impersonam*) that can be relocated or removed from one place to another. It means non-fixtures. Flowing from the rule stated above, a court can effectively have competence over movable properties present within its jurisdiction as at the time the proceedings against them start.

Cases decide in *rem* under private international law on movables other than ships are very scanty. Thus, to properly elucidate this sub-head, cases in admiralty will mainly be used. A case decided in this regard, will help us appreciate the principle better.

In *Despina G. K.* case,³⁴ the judgment creditors who were the owners of a cargo obtained judgment against the ship owner carrying the cargo. The judgment was not however, satisfied fully. The ship subsequently moved to England. The plaintiff then instituted an action in England claiming the balance of the judgment sum outstanding in an action *in rem* before the Swedish admiralty court in respect of the cargo. It was held that, a judgment creditor who has obtained a final judgment against a ship-owner by proceedings *in rem* in a foreign court, can bring an action *in rem* in England against the ship to enforce the decree of the foreign court if that is necessary to complete the execution of the judgment, provided that the ship is the property of the judgment debtor when she was arrested.

³³ Cheshire, G. C. and North, P. M. Op.cit, p.923-4

³⁴ (1983) Q. B. 214

jurisdiction on immovable:

As rightly submitted earlier, a court at common law has jurisdiction over immovables only if the immovables are situate within its jurisdiction. This general rule is based on the practical consideration that only the court of the *situs* can make a decree with regards to land.³⁵

It may be informative to point out that, ‘immovables’ comprises many items that cannot in common parlance, be regarded as land or part of the land. For example, money received from sale of land was considered as immovables.³⁶ Here too, brief look at two cases decided on the point will help us understand the principle better.

In *British South Africa vs. Companhia de Mocambique*,³⁷ the defendant broke into and took possession of large tract of lands and mines situate in South Africa. The plaintiff sued the defendant before an English court for trespass. The House of Lords in an appeal before them held that, an English court has no jurisdiction to entertain a suit with respect to foreign immovables. This decision which excludes the jurisdiction of an English court over foreign immovables was latter termed “exclusionary rule”.³⁸

Agbede³⁹ observed that, the exact scope of this decision remained in doubt. The decision has been given the following three interpretations viz:

- (a) That the English courts have no jurisdiction over title to foreign immovables.

³⁵ Cheshire, G. C. and North, P. M. Op.cit, p.375

³⁶Agbede, I. O. Op.cit, 258

³⁷ (1893) AC 602

³⁸ The rule is not absolute as it is subject to two limitations to wit (i) action founded on a personal obligation. It is based on the maxim, equity acts *in personam*. Thus, once it is established that the defendant owes personal or contractual obligation to the plaintiff i.e. if a mortgagee refuses to reconvey the property to the mortgagor after receiving the principal sum, interest and cost, the court will act on the personality of the defendant to indirectly force him to reconvey the property to the plaintiff though situate abroad. (ii) question affecting foreign land arising incidentally. As this exception sounds, the question to the foreign land only comes up incidentally but not as the main issue before the court. Consequently, the order of the court may affects the land situate abroad. For these exceptions, see Cheshire, G. C. & North, P. M. Op.cit, pp.377 and 383 respectively

³⁹Agbede, I. O. Op.cit, p.258

(b) That the English courts have no jurisdiction over title to foreign land or to grant damages for trespass thereto;

(c) That the English courts have no jurisdiction over title to foreign land or to grant damages for trespass or other torts thereto.

He submitted thus: “It has been suggested that if the scope of the decision were not restricted to the first interpretation, the rule in the case would produce, at worst, a total denial of justice and at best some glaring anomalies”.

The Federal Supreme Court in *Lanlehin vs. Rufai*⁴⁰ interpreted the decision in Mocambique’s case widely to mean number (b) of those possible interpretations suggested above. Ademola F.C.J., as he then was who spoke for the court said:

It is clear from the authority of the *British South Africa Company vs. The Companhia de Mocambique* that, in a case of trespass to land in a foreign country, even when the defendant is within jurisdiction, the Supreme Court of judicature in England will not entertain an action to recover damages for trespass to land abroad. The same test is therefore to be applied in this case and there can be no doubt that the Lagos High Court has no jurisdiction to entertain an action to recover damages for trespass to land in the Western Region.

However, the wider effect of this interpretation was taken care of in England by the provision of S.30 (1) of the Civil Jurisdiction and Judgments Act, 1982 which provides “the jurisdiction...to entertain proceedings for trespass to, or any other tort affecting immovables property shall extend to cases in which the property in question is situated outside (England) unless the proceedings are principally concerned with a question of the title to, or right to possession of that property”. This is another area, where the common law position in England was altered by the provision of local legislation. It is submitted that same provision should be

⁴⁰ (1959) 1 F.S.C. 100

enacted in Nigeria to avert decisions like the one in *Lanlehin vs. Rufai* (supra) in the spirit of justice and fair play among litigants.

3.2.1.2 Procedure for Enforcement under Common law:

The position under the common law is that, though the foreign judgment created an obligation, it cannot be enforced either in Nigeria or the United Kingdom directly without the institution of a fresh legal proceeding. That is to say the foreign judgment obtained becomes a cause of action before the enforcing court hence the need for instituting a fresh suit to have it realized.⁴¹.

The best way to go about this since the defendant could not have any defense to the action is to apply for a summary judgment proceeding or for an undefended list under Order 11 of the Kaduna State High Court Rules or Order 21 of the High Court of the Federal Capital Territory (Civil Procedure) Rules. In the case of English Court, the judgment creditor may apply for summary judgment proceedings under Part 74 of the Civil Procedure Rules. It therefore means that, whereas England has a Federal Law to guide foreigners to enforce their judgments, via registration easily; the position in Nigeria is different. Every state in Nigeria has a civil procedure rule which makes peculiar provision that may be confusing. A foreigner seeking to enforce his judgment in Nigeria has to be careful in understanding the procedure provided under every state's rules of procedure.

If the court is satisfied the judgment is such on the merit and by competent court, it will then enter judgment in favor of the judgment creditor. The implication is that, it is not the foreign judgment that will now be enforced but the judgment of the enforcing court.

⁴¹Efevewerhem, D. I. Op.cit p.394

3.2.2 Enforcement under Statutes

Statutes provide alternative enforcement procedure from that of common law. This alternative procedure is registration of the foreign judgment by the enforcing court. It is direct mode of enforcement because the foreign judgment will be registered for enforcement without the need for a fresh filing of the case as is done under the common law. Provided that, there is reciprocal arrangement of enforcement between Nigeria or United Kingdom and that other country.

The statutes admit to registration in these two countries, judgments pronounced by the courts of foreign countries which accord reciprocal treatment to judgments given by their respective courts. Thus, the preamble to the Nigerian statutes⁴² provide that, the procedure is aimed at facilitating the enforcement in foreign countries of judgments given in Nigeria and connected matters thereto. Consequently, the Acts apply only to those countries upon which the Minister in Nigeria or Her Majesty extends their application thereto. There is no such order by the Minister extending the application of the 1933 Act to any country⁴³. This provision limits scope of the Act because the Minister is yet to exercise the power vested in him. It is submitted that, there is a lacuna in this regard.

Unlike Nigeria, the United Kingdom has more than two statutes on the subject. It has up to five different instruments that regulate enforcement of foreign judgment depending on which part of the world the judgment is coming from. There is the Administration of Justice Act, 1920 which mainly applies to the judgments coming from the Commonwealth countries or other parts

⁴² Reciprocal Enforcement of Foreign Judgment Act, enacted in 1922 and codified as Cap. 175 Laws of Federation and Lagos, 1958; Foreign Judgment (Reciprocal Enforcement) Act enacted in 1962 but codified as Cap. F.35 L.F.N. 2004. (herein after called the 1922 Act and 1962 Act) respectively.

⁴³ Macaulay vs. R. Z. B. of Austria (2003) 18 NWLR (Pt. 852) 282

of Her Majesty's dominion seeking for enforcement in the United Kingdom. There is Foreign Judgment (Reciprocal Enforcement) Act 1933⁴⁴ applies to the countries with which the United Kingdom has reciprocal enforcement arrangement. There are Brussels Convention of 1968 and Lugano Conventions of 1988 which mainly regulate judgments coming from the countries within the European Community and Civil Jurisdiction and Judgment Act 1982. This wider range of enforcement instrument places England in a better stead than Nigeria as far legal regime for the enforcement of foreign judgment is concerned. This is because, the instruments provide a wider coverage of countries than those covered by Nigerian laws. The instruments cover the countries of the Commonwealth, countries to which the 1933 Act is extended and the countries within the European Community. By this hardly if there is a country which is left out from these instruments.

3.2.2.1 Conditions of Enforcement under Statutes:

The conditions for enforcing a foreign judgment under the two procedures (common and statutes) are the same. The Acts merely reproduce the provisions of the common law with respect to the conditions. From the combine reading of sections 3 (2) and 6 (1) of the 1961 Act sections 1 (2) and 4 of the 1933 Act⁴⁵ the following are the conditions to enforcement of foreign judgment either in Nigeria or the United Kingdom.

- (a) it is a judgment of a court of competent jurisdiction;
- (b) the judgment is final and conclusive as between the parties thereto; and

⁴⁴ The two Acts are henceforth referred to as the 1920 Act and the 1961 Act respectively.

⁴⁵Section 3 (2) of the 1961 Act; sections 1 (2) of the 1933 Act.

(c) the judgment is payment of a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

Provided that a judgment shall not be registered if at the date of the application –

(a) it has been wholly satisfied; or

(b) it could not be enforced by execution in the country of the original court.

Articles 1 and 4 of the Hague Convention⁴⁶ make the provisions concerning the conditions that a foreign judgment seeking enforcement in any of the contracting state must satisfy. The Article 1 provides: “the Convention does not apply to decisions for the payment of any customs duty, tax or penalty”. Article 4 provides:

“A decision rendered in one of the Contracting State shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention-

(1) if the decision was given a court considered to have jurisdiction within the meaning of this convention.

(2) if it is not longer subject to ordinary form of review in the State of origin .

In addition, to be enforceable in the State addressed, a decision must be enforceable in the state of origin”.

Other Conventions like the United Nations Convention on Contracts for the International Sale of Goods,⁴⁷ the United Nations Convention on the Use of Electronic Communication in

⁴⁶The Hague Convention on Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters, 1971.

⁴⁷ 1980

International Contracts do not make case for the recognition and enforcement of judgments obtained therefrom among the contracting states. Perhaps the Convention on recognition and enforcement apply to them all.

Each of the above listed conditions that a foreign judgment seeking enforcement must satisfy is discussed below in the light of decided cases on each if any.

- (a) it is a judgment of a court of competent jurisdiction.

Determination of jurisdiction is a procedural issue which is governed by *lexfori*. (i.e., laws of the forum). Thus, it is the laws of the enforcing court that is used to determine the jurisdiction of the foreign court that rendered the judgment. If a judgment is brought into Nigeria for enforcement from the United Kingdom, it is the Nigerian laws that will determine the competence of the English court. Same applies to Nigerian judgment seeking enforcement in England. Jurisdiction of the court under private international law could either *be in personam* or *in rem* depending on the subject matter before it. Each of the two is discussed below.

Jurisdiction InPersonam:

Section 6(2) (a) of the 1961 Act⁴⁸ provides for the conditions of ascertaining the jurisdiction of courts *in personam* to wit:

- (i) If the judgment debtor, being a defendant in the original court submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purposes of protecting or obtaining the release of property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

⁴⁸ 1961 Act

- (ii) If the judgment debtor was a plaintiff in, or counterclaimed in the proceedings in the original court; or
- (iii) If the judgment debtor being a defendant in the original court had before the commencement of the proceedings agreed, in respect of the subject matter of the proceeding to submit to the jurisdiction of the court or of the courts of the country of that court; or
- (iv) If the judgment debtor, being a defendant in the original court at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business, in the country of that court; or
- (v) 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.

Section 6(2)(c) provides for an omnibus criteria to wit: in the case of judgment given in an action other than any such actions as are mentioned in paragraph (a) above, if the jurisdiction of the original court is recognized by the law of the registering court in Nigeria.

Articles 10 and 11 of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters reproduce the above instances as grounds of assuming jurisdiction *in personam* in accordance with the provisions of the Convention. The Supplementary Protocol to the Convention⁴⁹ also states additional grounds that are not fundamentally different from the ones stated by the Acts.

⁴⁹ 1971.

A careful reading of the provisions of s. 6 (2), (a) (i-v) of the 1961 Act corresponding to s. 4 (1), (b), (i-v) of the 1933 Act⁵⁰ will show that, the conditions set out are almost similar to those under the common law listed by Diplock L. J. in the case of *Emmanuel vs. Symon*.⁵¹

Again, a careful reading of Section 6(2)(a)(i) shows that, the provision of the paragraph is subjected to the voluntary appearance of the defendant to the jurisdiction of the original court by appearing in the proceedings. Thus, if he does not voluntarily appear the court cannot assume jurisdiction over him.

It is submitted with all due respect that, this condition practically makes non-sense of the purpose of this law in the first place. The fact that a matter was taken to court is an indication that the parties were unable to come to an amicable settlement of issues in contention between them. It will take more than honour on the part of a business man, given as it were the enticing carrot provided by this condition, not to fall for it.⁵² An erudite jurist, Hon. Justice Oguntade JSC (as he then was) has this to say about the provision: "...it is inimical to the interest of trade and commerce if judgment in foreign countries cannot be readily enforced in Nigeria...it is an open invitation to fraud and improper conduct".⁵³

The implication of the provision is that, a defendant resident in Nigeria but properly served by a court in the United Kingdom under Order 11 but chose not to appear can successfully challenge the jurisdiction of the English court on this ground and the registration must be refused.

⁵¹ Supra

⁵² Oba, C. O. Op.cit, p.107

⁵³ *Grasvenor Casino Ltd v. GhassonHalonovi* (2009) 10 NWLR (pt 1149) p.309

The case of *Grosvenor Casinos Ltd vs. Halaoui*⁵⁴ clearly illustrated this point. In that case, the respondent who was indebted to the appellant issued a cheque to the appellant drawn on an English bank. The cheque was dishoured upon presentation to the bank. The appellant then instituted an action before the High Court of Justice Queen's Bench Division in England. The court in the UK gave leave to serve the court processes on the respondent in Nigeria which the said processes were served on him. For reasons best known to him, the respondent refused to appear/submit to the jurisdiction of the court. He however took step to reduce the debt. In an attempt to register the judgment obtained against him, the respondent raised the issue of his not having voluntarily submitted to the jurisdiction of the English court. Based on Section 3(2) of the 1922 Ordinance, the Supreme Court upheld this contention and set aside the registration of the judgment by the High Court.

Thankfully, Section 6(2)(a)(iii)⁵⁵ provides a way out to the foreigners doing business with Nigerians abroad. It provides that a foreign court can have jurisdiction if the defendant had before the commencement of the proceedings agreed to submit to the jurisdiction of the foreign court.

Going by the above provision, what persons doing business with Nigerians abroad have to do is to ensure that, their contractual document contains a clause to the effect that the Nigerian partners agree to submit to the jurisdiction of the foreign court. Else, the judgment may not be enforced in Nigeria.

Oba, C.O.⁵⁶ submitted that, the above situation is uncalled for, in an era of global commerce. If Nigeria has a reciprocal arrangement with another country for the enforcement of

⁵⁴ Ibid

⁵⁵ 1961 Act

⁵⁶ Oba, C.O. Op.cit

their judgment then given judgment debtor leeway to escape justice is like taking back with one hand what is given with the other.

More so that, under our domestic/municipal laws where a defendant is properly served with the originating processes in an action and he refuses to appear, he would be bound by the subsequent judgment given in the case. At best he can only apply to have the judgment set aside upon a reasonable cause shown. It is submitted this position should be extended to judgments delivered abroad but meant for enforcement in Nigeria.⁵⁷ The situation is not the same in the UK where by virtue of Order 11 Civil Procedure Rules, 1998 judgment is enforceable once the defendant is properly served.

However, a defendant that is duly served with a court writ and responded to the writ by putting appearance cannot latter on hide under this provision. In *Dale Power Systems Plc. vs. Wilt and Bush Ltd*⁵⁸, the defendant filed process acknowledging services of writ from the Queen's Bench Division of High Court of Justice in England, filed a statement of defence and appealed against the judgment and lost. In the circumstance, the High Court of Lagos, Ikeja Division held on an application to set aside the foreign judgment, that he had voluntarily submitted to the jurisdiction of the English court and consequently that court had jurisdiction over him.

Grounds number two (ii) and three (iii) are about the voluntary submission of the judgment to the jurisdiction of the court. By ground number two, voluntary submission to the jurisdiction of the court will be imputed when the judgment debtor acted as the plaintiff or a counter-claimant before original court. In this instance he cannot be heard to complain that the court acted without jurisdiction since he is the person that sets it in motion. Neither will he be heard to alleged lack of jurisdiction when he agrees prior to the commencement of the

⁵⁷ Order 10, Kaduna State High Court (Civil Procedure) Rules 2007, Mohammed vs. Husseni (1998) 12 SCNJ 136 at 139

⁵⁸(2001) 8 NWLR (Pt. 1716) p. 667

proceeding to submit to the jurisdiction of a particular court as provided for by ground number three.

A defendant in an action *in personam* is either natural or juristic person. Thus, Section 6(2), (iv and v)⁵⁹ provide for the criteria of determining jurisdiction of a foreign court over corporate bodies with a residence or having principal place of business. Just like the situation under the common, service of court processes on the defendant is very crucial before his amenability to the jurisdiction of the court. Thus, failure to effect service on him is very fatal.

Jurisdiction In Rem:

Jurisdiction *in rem* is statutorily taken care of in Nigeria by the Foreign Judgment (Reciprocal Enforcement) Procedure Act,⁶⁰ precisely Section 6 (2) (b) and (c) of the Act provides for the basis of assuming jurisdiction on both movables and immovables as follows:

In the case of a judgment given in an action of which the subject matter is immovable property or in an action *in rem* of which the subject matter was moveable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court.

The above provision is almost a verbatim reproduction of the common law rule stated in Mocambique's case. Section 6(2)(c) is an omnibus one, in that it provides in the case of a judgment given in an action other than any such action as is mention in paragraph (b) of the section, if the jurisdiction of the original court is recognized by the law of the registering court.

However, in England, the *situs* rule does not wholly apply on judgments *in rem* affecting a moveable property. For example, English courts recognize that the courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a

⁵⁹ 1961 Act

⁶⁰ Ibid

testator or in tested dying domiciled in such country.⁶¹ Judgments *in rem* unlike judgments *in personam* are not mostly enforced but recognized since normally, the subject matter that is the *res* is located not in the registering court but the original court that decided the case.⁶²

The 1933 Act uses 'Recognised Courts'.⁶³ Of competent jurisdiction the question that may be asked is, are those recognized courts different from the courts designated superior in Nigeria? The answer seems no in the humble opinion of the researcher. This opinion is formed based on the fact that, in England, the rule of procedure that regulates the proceeding of court in an application to enforce a foreign judgment is the Civil Procedure Rules⁶⁴ which is applicable from the High Courts to the Supreme Court. Therefore, one can assume that since these are the recognized courts to enforce foreign judgments in England, they would also be the courts of foreign country to be recognized to deliver judgment for enforcement in England.

Be that as it may, the judgment of the superior court or the recognized court must not be a judgment from an appeal against the judgment of non-superior court or recognized court because; by the provisions of the Acts such a judgment is not enforceable.⁶⁵

(b) Final and Conclusive: the judgment sought to be enforced must also be final and conclusive as far the rights and liabilities of the parties. The expression is repetitive because, what is final is certainly conclusive. A final and conclusive judgment is such which serve as *res judicata*. By this is meant not only that the judgment must have put an end to the particular

⁶¹ Dicey and Morris Op.cit, p.511

⁶² Farida, A. K. (2007/09) " Legal Regime for Recognition and Enforcement of Foreign Judgment under Private International Law: An Overview", *Journal of Private and Comparative Law*. Vols. 2 & 3 Faith Printers Zaria p.176

⁶³ S.1(2)(c) of the 1933 Act; However, the 1920 Act use the Nigerian term which is 'superior court'

⁶⁴ 1998

⁶⁵ S.3(2) of the 1961 Act and S.1 (2A)(a) of the 1933 Act

proceedings pending between the parties but that it must also settle once and for all the controversy between the parties which led to those proceedings.⁶⁶

In the wordings of the Court,⁶⁷ a judgment is final and conclusive in the following circumstance.

In order to establish that a final and conclusive judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.

Thus, a foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment.⁶⁸ But a default judgment may be final and conclusive, even though it is liable to be set aside in the very court which delivered it.⁶⁹

Nigeria is a federation of states; each state has High Court with coordinate jurisdiction to the High Court of other states. It may be asked, is the judgment of a high court of one state final and conclusive though the judgment debtor decides to challenge the said judgment before the high court of another state?

The researcher did not come across any decided case with such a scenario, but should in case it happens, the foreign court may still consider the judgment as final and conclusive provided it settles the controversy between the parties finally and forever at least before that court. This is so because, even in the country of the original court, the two courts are of

⁶⁶ Tony, A.I. op. cit. p.104

⁶⁷ The Honda Place Ltd vs. Globe Motor Holdings Nig. Ltd (2005) 7 SCNJ p.477

⁶⁸ Ibid.

⁶⁹ Dicey and Morris op. cit. p.477

coordinate jurisdiction as such none has the power to review or overrule the judgment of the other.

Garnishee proceedings, are conducted in successive stages that is, an order *nisi* is made first before the order is made absolute. Upon good cause shown, an order *nisi* might be varied or discharged completely, but once the order is made absolute except in few circumstances the proceeding terminates and becomes final and conclusive. In the absence of compliance from the garnishee, execution may be levied against his property wherever found. In garnishee proceedings therefore, an order *nisi* is not final and conclusive as such not enforceable abroad. To be able to enforce it, the judgment creditor must endeavour to push for an order absolute

. A judgment shall be deemed be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject of appeal, in the courts of the country of the original court.⁷⁰ If however, the effect under the foreign law of a pending appeal is to stay execution of the judgment, it would seem that, in the interim, the judgment is not actionable in England.⁷¹

Finally, the requirement of finality and conclusiveness of a judgment means the judgment must be final and conclusive in the country of the original court and not in the country of the enforcing court. In the wordings of the court, while deciding the case of *Carl Zeiss Stifling vs. Rayner & Keeler Ltd (No.2)*⁷² stated thus:

We should have to be satisfied (for *res judicata* purposes) that the issue in question cannot be relegated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the reopening in

⁷⁰ S. 3(3) of the 1961 Act and S.1(3) of the 1933 Act.

⁷¹ Cf *Berliner Industries Bank A.G. vs. Jost* (1971) 2 QB 463 @ 470-471

⁷² (1967) 1 C.A. 853

any new case between the same parties on the issues decided by the (German) Supreme Court in 1960, which are now said to found an estoppel.

(c) For payment of a definite sum of money not being taxes, fines other penalty of like nature. The foreign judgment must also be for a fixed and a definite sum. Such a fixed sum must not be in respect of taxes, charges, fine or penalty.⁷³ The requirement that the judgment must be for a definite sum not being taxes or other sum of like nature stemmed from the common law rule that the English courts will not enforce the penal laws of a foreign state. In the course of deciding the case of *United States of America vs. Inkleby*,⁷⁴ Purchas L.J. spelled out the principles as follow:

(1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law; (2) that regard will be had to the attitude adopted by the court in the foreign jurisdiction which will always receive serious attention and may not on occasions be decisive; (3) that the category of the right of action, i.e public or private, will depend on the party in whose favour it is created, on the purpose of the law or enactment in the foreign state on which it is based and on the general context of the case as a whole; (4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by whatever description it may be known if the purpose of the action is enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained; (5) that the fact that in the foreign jurisdiction recourse may be had to a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country.

While the case is consistent with established authority, it is arguable that the approach adopted by the court is too restrictive. It is difficult to see what public interest of England that could conceivably said to have been advanced by the case of the *United States of America vs.*

⁷³ S. 3(2)(b) of the 1961 and S.1(2)(c) of the 1933 Act.

⁷⁴ (1989) QB 255

Inkley.⁷⁵ It is not clear how the interests of justice are advanced by a blanket refusal to enforce foreign penal or revenue laws.⁷⁶

Penalty used in the provision does not include damages award to the judgment creditor. In *SA Consortium General Textiles vs. Sun and Sand Agencies Ltd*⁷⁷ the defendant had been ordered by a French judgment to pay in addition to compensatory damages a sum by way of further damages for a head of damages awarded where a defendant has unreasonably refused to satisfy an obviously good claim. The Court of Appeal obviously refused the defendant's argument that the extra head of damages was a penalty. According to Lord Denning MR a penalty is 'a sum payable to the state by way of punishment and not a sum payable to a private individual even though it is payable by way of exemplary damages'.

In order for judgment of a fixed sum to be registered for enforcement, the judgment shall not be wholly satisfied.⁷⁸ However, if at the date of the application for registration, the judgment of the original court has been partly satisfied the judgment 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 at that date.⁷⁹

Charges, taxes, fines or penalty also do not include costs and interests awarded. In addition to the sum of money payable under the judgment of the original court including any interest which by the law of the country of the original court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and

⁷⁵ Supra

⁷⁶ Tony, A.I. *op. cit*, p.111

⁷⁷ (1979) QB 279

⁷⁸ S.4(4) of the 1961 Act and S.2(4) of the 1933 Act.

⁷⁹ S.4 of the 1961 Act and S.2 of the 1933 Act.

incidental to registration, including the cost of obtaining a certified true copy of the judgment from the original court.⁸⁰

Where the sum payable under a judgment which is expressed in a currency other than the currency of Nigeria or United Kingdom as the case may be, the judgment shall be registered as if it were a judgment for such sum in the currency of the enforcing country on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum payable.⁸¹

The provision of the 1961 Act is that, the foreign currency equivalent should be at the rate prevailing as at the date the judgment of the original court was delivered. However, the judgment of the court in the case of *Anyaorah vs. Anyaorah*⁸² suggests otherwise. The Court in that case held as follows:

Where a claim is in foreign currency, the plaintiff is entitled to get the judgment sum in foreign currency. If however, as a matter of grace or convenience, the money was to be paid in naira, it had to be at the exchange rate applicable on the date of execution and not on the date of judgment as bank or bureau de change can only sell or buy foreign currencies at the rate prevailing on the date of exchange. The court seized of the matter should give a directive to the registrar of the court 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 the judgment.

There is no doubt that, the reasoning of the court in that case was sound, but the question is, can a court of law give judgment contrary to the clear provision of a statute? Addressing this question, the apex court of Nigeria held:

⁸⁰S.4(6) of the 1961 and S.2(6) of the 1933 Act.

⁸¹S.4(3) of the 1961 Act and S.2(1) of the 1933 Act.

⁸²(2001) 7 NWLR (pt.711) 158 C.A.

Thus where the language of a statute is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. The court must bear in mind that its function in that respect is *jus dicere*, not *jus dare*, and the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of the legislature. This is what our courts do and I do not think as chief Gatzama submitted, any of the court ever embarked on what he called judicial activism⁸³

On the other hand provision of S.2(1) of the 1933 Act is that, if the judgment is expressed to be in the currency of a foreign country, it will be registered in that currency or its sterling equivalent at the time of payment. It is submitted that this provision is more reasonable compared to what is obtained in Nigeria.

By the provisions of sections 4 (1) and 2 (1) of the 1961 Act and 1933 Act respectively, the registration is mandatory once the above conditions are satisfied the court before which the foreign judgment seeks to be enforced ‘shall’ subject to proof of the prescribed matters and to the provisions of the Acts, order the judgment to be registered. However, section 9 (1) of the 1920 Act makes the registration discretionary. In the wordings of the Act “on any such application the court “may”, if in all the circumstances of convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

3.2.2.2 Procedure of Registration

In Nigeria, the two statutes provide for the procedure for registering a foreign judgment.⁸⁴ The 1961 Act⁸⁵ under S.5 provides for making rules of court which will *inter alia* takes care of an application for the registration of a judgment. To the knowledge of the researcher, S.5 of the Act

⁸³Ugwu vs. Arorume (2007) 12 NWLR (pt.1048) p.498 para C-D

⁸⁴ The 1961 Act and the 1922 Act.

⁸⁵ Cap. F.35 L.F.N. 2004

is not given effect yet as there is no any rules of court made for registration of a judgment as contemplated by the Act.

The 1922 Act⁸⁶ also under s.6 makes similar provision to that of S.5 of the 1961 Act. Fortunately however, the section was given effect by making the rules of court which was gazette on the 21st September, 1922.⁸⁷ It could be recalled that, there are court judgments⁸⁸ to the effect that the two statutes continue to apply concurrently despite the fact that, Reciprocal Enforcement of Foreign judgment was omitted in the collection of the Laws of the Federation 1990. Thus, in the case of Nigeria reference will be made to both Acts under this head.

In the case of the United Kingdom, S.3 of the Foreign Judgment (Reciprocal Enforcement) Act⁸⁹ provides in similar way to that of S.5 and 6 of the two Acts applicable in Nigeria for making Civil Procedure Rules to regulate registration procedure. Consequently, Civil Procedure Rules⁹⁰ is put in place as far registration of a foreign judgment is concerned. The Acts provides:

A person being a judgment creditor under a judgment to which the part of this Act applies, may apply to a superior court in Nigeria at any time within six years after the date of the judgment, or where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in such court, and on any such application the court shall, subject to proof of the prescribed matters and to other provisions of this Act, order the judgment to be registered.⁹¹

⁸⁶ Cap. 175 Laws of the Federation & Lagos 1958.

⁸⁷ Hereinafter called the 1922 Rules

⁸⁸ *Teleglobe America Inc. vs. 21st Century Techni Ltd.* (supra) p.114

⁸⁹ 1933

⁹⁰ Hereinafter called the 1998 Rules

⁹¹ S.4(1) of the 1961 Act and S2(1) of the 1933 Act.

To start with, the Reciprocal Enforcement Acts quoted above provide for a period of six years within which an application for registration of a judgment should be made. But when there is an appeal against the judgment, the application should be within six years after the date of the last judgment in the chain of these proceedings. The period allowed by the 1920 Act and the 1922 Act is 12 months within which to make the application⁹².

However, in the case of Nigeria, if the application is to be made before the minister makes an order extending the application of part 1 of the 1933 Act as provided by S.3 of the Act to the country of the enforcement; the application for registration if the judgment is coming from any of the Commonwealth countries is within 12 months. The court in *Teleglobe America Inc vs. 21st Century Tech. Ltd*⁹³ held as follows:

By the provision of S.10 of the foreign judgment (Reciprocal Enforcement) Act, application for enforcement of a judgment given before the commencement of an order under S.3 of the Act applying Part 1 of the Act to the foreign country should be made within twelve (12) months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria.

The application to register a judgment for enforcement should be made by petition/motion *ex parte* to the High Court.⁹⁴In the recent case of *VAB vs. Mike Momoh*⁹⁵the Supreme Court of Nigeria when making pronouncement on a judgment brought to Nigeria from England for enforcement said, the application for leave to register foreign judgment is by way of petition or motion *ex parte*. If the application is made *ex parte*, the judge to whom it is made may direct notice to be served on the judgment debtor.⁹⁶ The application must be supported by an

⁹² S. 9 (1) of the 1920 Act.

⁹³ *Teleglobe America Inc. v. 21st Century Techni Ltd.* (supra) p.114

⁹⁴ Rule 1(1) of the 1922 Rules and Part. 74 of the 1998 Rules as cited by Claire, S. (2007) *Enforcement A.A. Judgement*, 10th Ed. Thomson Sweet & Maxwell London.

⁹⁵ (2013) 14 NWLR (Pt. 1374) p.284

⁹⁶ Rule 1(2) of the 1922 Rules and Part 74 of the 1998 Rules

affidavit or witness statement. Rule 3 provides that the affidavit and petition should be titled “in the matter of the Reciprocal Enforcement of Judgments Ordinance, and the Matter of a Judgment of the (describing the court) obtained in (describing the cause or matter) and dated the... day of...”⁹⁷

Similarly, part. 74⁹⁸, provides the application should be headed “in the matter of the Foreign Judgment (Reciprocal Enforcement) Act 1933”. The title of the witness statement or affidavit should also identify the judgment by reference to the court in which it was obtained and its date. The affidavit in support of the application must disclose the following facts.⁹⁹

- a. The written evidence in support of the application for registration must show the name and address for service within jurisdiction of the judgment creditor;
- b. The written evidence must also state the name of the judgment debtor and his address or place of business if known;
- c. Where the case involves the enforcement of a money judgment, then the amount of the judgment which remains unsatisfied must be given.
- d. Where interest is recoverable on the judgment under the law of the state of origin, then the amount of interest which has accrued up to the date of the application, or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue must be stated;
- e. The statement that the judgment is a money judgment;
- f. Confirmation that the judgment can be enforced by execution in the state of origin;

⁹⁷ 1922 Rules

⁹⁸ 1998 Rules

⁹⁹ Rules 4 of the 1922 Rules and Part 74 of the 1998 Rules.

g. Confirmation that the registration could not be set aside under the Acts.

h. When the judgment contains different provisions, some but not all of which can be registered for enforcement, the judgment creditor needs to set out those provisions in respect of which it is sought to register the judgment and include further evidence on:

- i. the enforceability of the judgment in the state of origin and
- ii. the law of that state under which any interest has become due under the judgment, which may be required under the relevant order in council extending pt. 1 of the 1933 Act to that state.

The application must also establish a certified or verified true copy of the judgment. Where the judgment is not in English language, then a translation of it into English language which is either certified by a notary public or similarly qualified person, or accompanied by written evidence confirming that the translation is accurate must also be exhibited.

The application for registration shall be an originating process and, unless otherwise ordered by a judge, shall be served in the manner a writ of summons is required to be served. The judgment debtor shall not be required to enter any appearance thereto.¹⁰⁰

If the court is satisfied with the application or petition for registration, it can make an order for it to be registered on behalf of the judgment creditor. The order shall be served on the judgment debtor if it was heard on notice. But where the order is made on an *ex parte* application no service of the order on the judgment debtor shall be required.¹⁰¹

¹⁰⁰Rule 4 of the 1922 Rules and Part.74 of the 1998 Rules.

¹⁰¹Rule 5 of the 1922 Rules and Part 74 of the 1998 Rules.

If the judgment debtor is to be put on notice, the notice shall in the absence of an order by the judge as to the mode of service thereof be served on the judgment debtor by personal means as in the case of a writ of summons.¹⁰² The notice of registration shall contain full particulars of the judgment registered and of the order for such registration and shall state the name and address of the judgment creditor or of his solicitor on whom process issued by the judgment debtor may be served. The notice shall state that the defendant is entitled, if he has grounds for doing so, to apply to set aside the registration and shall state the number of days for applying to set-aside the registration limited by the order giving leave to register.¹⁰³

The order shall state the time within which the judgment debtor is to be entitled to apply to set aside the registration. Such time when the judgment debtor is or is ordinarily resident within the area of the town where the court is situated for the time being shall be fourteen (14) days and when the judgment debtor is or is ordinarily resident outside the said area shall depend on the distance from the town of the place where the judgment debtor resides and the postal facilities between the town of the court and that place.¹⁰⁴ While the Nigerian rules make provision for 14 days within which to respond to notice of registration, the English rules provides for a period of 21 days¹⁰⁵ The judgment ordered to be registered shall be registered in the register of judgments normally kept in High Court registry of the registering court in accordance with the order for registration.¹⁰⁶

The register shall be arranged in alphabetical order in the surname of the judgment debtor and there shall be entered in the register the date of the order for registration and of the

¹⁰²Rule 9 of the 1922 Rules.

¹⁰³Rule 10 of the 1922 Rules.

¹⁰⁴Rule 6 of the 1922 Rules.

¹⁰⁵Part 74 of the 1998 Rules.

¹⁰⁶Rule of the 1922 Rules.

registration, the name, title, trade or business and usual or last known place of abode or business of the judgment debtor and judgment creditor and the amount for which the judgment is signed, and any special directions in the order for registration as to such registration and execution thereon and the particulars of any execution issued thereon.¹⁰⁷

If upon being served with the notice of registration, the judgment debtor feels he has sufficient grounds for setting aside the registration, he can then apply for same to be set aside within the number of days specified by the order. The application is by petition not by motion.¹⁰⁸ And failure to comply with this procedure is fatal! The case of *L.F.C. vs. DNSL Offshore*¹⁰⁹ best illustrates this point. In that case, the Respondent applied for registration of the judgment of a London High Court, earlier granted the appellant by the Federal High Court in Port Harcourt to be set aside. The application was by way of motion on notice. The Court of Appeal held once the procedure for commencing an action has not been adopted, the application or the action is incompetent and should not be entertained.

The application for setting aside the registration shall be headed in the same manner the application for the registration above was headed. The application shall also be supported by an affidavit headed in the like manner the application is headed.¹¹⁰ It should contain facts the registering court may consider sufficient to set aside the registration.

S. 4 (1) of the 1961 Act and S. 2 of the 1933 Act that provide for an application to register a judgment and empowers the court to make order for registration also has a proviso that states:

¹⁰⁷Rule 8 of the 1922 Rules.

¹⁰⁸Rule 12 of the 1922 Rules. In *L.F.C vs. DNSL Offshore Ltd*

¹⁰⁹ (2008) 9 NWLR (pt.1093) 606 at 655

¹¹⁰Rule 13 of the 1922 Rules.

Provided that a judgment shall not be registered if at the date of the application –

- (a) It has been wholly satisfied; or
- (b) It could not be enforced by execution in the country of the original court.

Deciding on the import of the above proviso, the court in *Teleglobe America Inc. vs. 21st Century Techni Ltd*¹¹¹ held,

The court will refuse to register a foreign judgment when the conditions in S.4 of the Foreign judgment (Reciprocal Enforcement) Act are not fulfilled, inclusive of when the judgment cannot be enforced by execution in the country of the original court. The conditions set out under S.4 should be considered by the trial court before registering the judgment or refusing to register it.

The court is likely to set a registration aside if as provided by Section 6(1) (a)¹¹². It is satisfied from the application of the judgment debtor to set aside the registration that:

- (i) that the judgment is not a judgment to which this part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or
- (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
- (iii) that the judgment debtor being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) received notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
- (iv) that the judgment was obtained by fraud; it important at this point to state that, fraud is one of those words court finds difficult to define. Commenting on this difficulty,

¹¹¹(supra)

¹¹² S.6 of the 1961 Act , S.4 of the 1933 Act and s.9 of the 1920 Act.

NGWUTA J.C.A. stated that: “Fraud in its meaning stands on shifting sand. It is a chameleon-coloured word. The difficulty in defining fraud is such that courts refrain from defining fraud lest they be confronted by their definition and it be found too or narrow to cover cases that may subsequently arise” nonetheless he went ahead to define it thus: “Fraud is false representation by means of a statement or conduct made knowingly or recklessly in order to gain material advantage”. To prove fraud the party alleging it must produce to the court newly discovered evidence since after the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial would probably have affected the result¹¹³ otherwise the defence will fail. The position is not the same in England. The decision of English Court of Appeal in *Jet Holdings Inc. vs. Patel*¹¹⁴ showed foreign judgment could be impeached on the ground of fraud even though no newly discovered evidence is produced and even though the fraud might have been, and alleged in the foreign court but overruled. It is submitted that, the Nigerian position is better, because that of the English court might amount to a review of the foreign court judgment which is not allowed under private international law; or

- (v) that the enforcement of the judgment would be contrary to public policy. Public policy is defined as “community sense and common conscience extended and applied throughout the state to matters of public morals, health, safety, welfare and the like”. Application to set aside registration for enforcement on the ground that the judgment is against the public policy in Nigeria failed in the case of *Agro Allied Dev. Ent. Ltd*

¹¹³F. M. F. Ltd vs. Rivers Bori (2005) 9 NWLR (Pt. 930) 257.

¹¹⁴(1990) 1 QB 335

*vs. U.S.T. Co*¹¹⁵.Inc. in this case, the respondent who won an arbitral award against the appellant in an English arbitral proceeding applied to register it in Nigeria. The appellant challenged the registration on the ground that, it is contrary to public policy to enforce English awards in Nigeria. The court dismissed his application and register the judgment; or

- (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made.

Finally, no proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which part 1 of the 1961 Act and 1933 Act applies shall be entertained other than by way of registration in any court either in Nigeria or the United Kingdom¹¹⁶

The rationale for the above sections is to preserve all foreign judgment and averts incidences of our courts going into the merit of a foreign judgment. Therefore, once a foreign judgment is for registration, the trial court must limit itself to the requirement under Section 4 (of the 1961 Act)¹¹⁷

3.4 EFFECT OF REGISTRATION

Once registered, a judgment shall for the purposes of execution be of that same force and effect as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.¹¹⁸

¹¹⁵ (2001) 9 NWLR (Pt. 1252) 260

¹¹⁶ S.8 of the 1961 Act and S.6 of the 1933 Act.

¹¹⁷ *Teleglobe America Inc. v. 21st Century, Techni Ltd.* (supra)

¹¹⁸ S. 4(2) of the 1961 Act and S.2(2)(a) of the 1933 Act.

Another effect of registration is that proceedings may be taken to enforce the registered judgment.¹¹⁹ The registering court shall have the same control over the executive procedure.

3.5 POST REGISTRATION PROCEDURE

Although a judgment is registered and becomes due for enforcement, but the practice is that no such enforcement procedure will be allowed to commence without the expiration of the period within which the judgment debtor is expected to apply for the setting aside of the registration or the final determination of an appeal he may wish to file against the registration.¹²⁰

After registration and the expiration of the prescribed period, the judgment creditor can go ahead with the enforcement procedure before the registering court as if it is the court that pronounces the judgment.

As the Above Notes show, the Nigerian and United Kingdom laws on regulation of the judgment enforcement procedure closely mirror each other in many respects. This is because the laws of these two countries are partnered in the same way. The two countries use the same common laws on the subject. Additionally, the statutes of these countries on the subject are mere codification of what obtains under the common law. Nonetheless, the table below indicates the summary of how these set of laws differ despite their Similarities.

¹¹⁹S.4(2)(b) of the 1961 Act and S.2(2)(b) 1. The 1933 Act.

¹²⁰ Proviso to S.4(2) of the 1961 Act and S.2(2) of the 1933 Act.

	NIGERIA	UNITED KINGDOM
Jurisdiction on Immovable's at Common law	Court has no jurisdiction to recover damages for trespass to land outside jurisdiction see Lanletrin vs. Rufai (supra)	Court has Jurisdiction to recover damages for trespass to land outside Jurisdiction S. 30 (1) of the Civil Jurisdiction and Judgment Act,1982 altered the common law position
Statutes on Recognition and Enforcement of Judgment.	-Reciprocal Enforcement of Judgment-1922 - Foreign Judgment (Reciprocal Enforcement) Act, 1962	-Administration of Justice Act, 1920- on registration of judgment from common wealth counties. -Foreign judgment (Reciprocal Enforcement) Act 1933-on registration of judgment from counties with which there is reciprocal -1968 Brussels convention. -1988 Lugano convention. Civil Jurisdiction and Judgment Act, 1982
Personal Jurisdiction Under Statutes	S .6(2)(a) says, to assume Jurisdiction over a non-resident defendant, he must voluntarily appear before the court <u>otherwise than for two purposes of protecting or obtaining the release of property seized.</u>	S.4 (2) (a) did not state such qualification. Neither S. 9 (2) of the Administration of Justice Act
Enforcement Procedure at Common Law	Via summary judgment procedure or undefended list regulated by state rules of	Via summary judgment procedure regulated by federal legislation order 11 Civil

	procedures like order 11 of Kaduna State High court Rules.	Procedure Rules (formally Rules of the Supreme Court).	
Exclusion of common law by statutes	S.8 of the 1961 Act, foreign judgment which can be registered not to be enforceable otherwise.	S.6 of 1933 Act make similar provision. But 1920 did not.	
Reciprocal extension of statutes to other counties	By the minister, who is still yet to do.	By his majesty/her majesty who has done so. For example to Israel, Pakistan, India.	
Foreign judgment to be registered	Must be by superior court	Must be superior court 1920 Act	By recognized court 1933 Act
Enforcement requirement	Must be final and contusive	Must not be final and contusive under 1920 Act but must be under 1933 Act.	
Use of Discretionary power	S. 4 of the 1961 Act, once a judgment satisfies S.3 shall be registered for enforcement	S.9 of the 1920 Act gives the court discretion by using may register. S. 2(1) of the 1933 Act also sounds mandatory by provideshall.....	
Currency of Enforcement	S. 4(3) Naira or Naira equivalent on the date of judgment	S.5 starling or starling equivalent on the date of <u>execution</u>	
Flexibility	The statutes provisions are strict, compliance mandatory	Lugarno and Berusals Conventions are flexible relaxing the requirement of jurisdiction, finality and conclusiveness of judgments.	

<p>Proof of fraud defense of natural justice requirement</p>	<p>The party alleging fraud must produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial would probably have affected the result. UNICAL vs. Ugochukwa (supra) due notice' and a proper opportunity to be heard</p>	<p>Fraud could be proved even though no newly discovered evidence is produced and even though the fraud might have been, and was in fact alleged in the court proceeding but overruled.</p> <p>Abouloff vs. oppenheima (supre) 'due notice', 'proper opportunity to be heard' and 'whether there was a procedural defect that compromises substantial justice</p>
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Lessons:

- (1)The position of letting fraud to be raised for second time as practiced by the English court amounts to abused of court process.
- (2)The defense of natural justice is wide in the United Kingdom.
- (3)The provision of the 1933 Act that says currency-sterling or its equivalent on the day of execution is better compared to that of Nigeria that says on the date of judgment. Because value of money fluctuates.
- (4)Looking of the provision of the 1920 Act and that of Brussels and Lugarno convention, enforcement of judgment in United Kingdom is more comprehensive and flailed.
- (5) United Kingdom has enough number of statutes to carter for virtually judgment coming for every country. But Nigeria did not, the only operatives Act being Reciprocal Enforcement of judgment, 1922 meant only for common wealth countries, because the minister is yet to kid start the 1961 Act hence a lot of care should be taken in using it.

3.6 CONCLUSION

This chapter discusses the two major ways through which a foreign judgment can be enforced whether in Nigeria or the United Kingdom on a comparative basis. In the course of the discussion, emphasis was placed on the conditions and procedures to the enforcement as provided by the laws of the respective countries (Common law and statutes), effect of registering a judgment and the steps to be taken after the registration. A table is drawn to clearly show the similarities and distinctions of the two laws.

CHAPTER FOUR

A CASE FOR CYBER-JURISDICTION

4.1 INTRODUCTION

It is so far noted in chapter three that, in common law, *in personam* jurisdiction is either based on the presence of the defendant within jurisdiction so that the court's writ can be served on him or his submission to the jurisdiction of the court vide contractual agreement or lodging a counterclaim against the plaintiff.¹ Almost the same bases were adopted by the statutes.²

The criteria that requires the presence of the defendant within jurisdiction cannot fit into the cyberspace which is placeless, thus, the presence of the defendant cannot be traced to any geographical location. It is this peculiarity of the cyberspace that necessitates the need for a special consideration of the scenario or developing new standards or bases of jurisdiction that could fit the cyberspace as far private international law is concerned. This chapter examines the efforts so far made to address the challenge.

4.2 DETERMINATION OF CYBER - JURISDICTION

When cases from online transaction begin to flood our courts, the confusion that trails the minds of judges and lawyers like³ are:

- a. Whether a particular event in the cyberspace is controlled by the laws of the country where the website is located, such that the courts of that country will hear the case even if neither the defendant nor the subject matter is connected to that country; or
- b. By the laws of the country where the internet service provider is located; or
- c. By the laws of the country where the internet user is located; or

¹ Emmanuel vs. Symon (Supra)

² SS.6 and 4 of the 1961 Act; respectively

³ Julia Alpert Gladstone (2003) *Determining Jurisdiction in Cyberspace. The "Zippo" Test or the "Effects" Test* assessed on March 2, 2012 from <http://euro.ecom.cmu.edu/program/low/8-372/jurisdiction/aladstoneDeker>. p.1

- d. By the laws of every country from which the information on the website can be assessed;
- or
- e. By all of the above?

Sorting out answers to the above questions has generated numerous courts judgments and commentaries. Some of the models or standards that are put to the forefront for ascertaining courts' jurisdiction from online transactions are discussed below.

4.2.1 Use of Statutory Instruments (Long Arm Statutes): These are statutes that empower a court to exercise jurisdiction on a defendant who is outside jurisdiction⁴. In this regard, some scholars⁵ have proposed a “simplifying move” of recognizing cyberspace as distinct place to which distinct laws may be applicable. This according to them would result in a new cyber-forum with the jurisdiction to apply the proper body of cyber law to determine the right and liabilities of cyber-citizens. This new set of rules applicable only to the cyber world, would greatly simplify several legal issues. For example once a cyber-forum is established and the body of the cyber law developed, the jurisdictional and choice of law issues would be significantly simplified.

Johnson and Post⁶, suggest that law-making institution for the cyber forum should be developed. They recommended five law-making bodies for five different cyber forums in the table below:

⁴ Jay Kesan (2009) *Brief Summary of personal Jurisdiction Law*. P2. Retrieved June 14, 2014 from www.cyberspacelaw.org/kesan/kesan1.html

⁵ David, D. P. (1996) *Anarchy State and the Internet: An Essay on Law-Making in Cyberspace*. Retrieved November 24, 2014 from www.temple.edu/lawschool/depost/Anarchy.html p.17

⁶ Ibid

Cyber Forum	Laws	Sanctions
Controller	Substantive rules	Sanctions
The actor him/herself	Personal ethics	Self-sanction
Second party controllers i.e., the person acted upon	Contractual provisions	Various self-help mechanisms
Non-hierarchically organized social forces	Social norms	Social sanctions
Hierarchically organized non- governmental organizations	Organization rules	Organization sanctions
Governments	Law	State enforcement, coercive sanctions

In the above table, the first four laws perfectly suit the corresponding cyber forums. But the last one may not wholly be effective. Although, local legislation by the government of a country can go a long way in addressing the challenge of determining jurisdiction in the cyberspace, yet it would suffer when it comes to enforcement. This is because a government can only make legislation for its territory alone, not for another country. Hence is not wholly reliable.

This perhaps explains the failure of the two countries that are the case study of this research to make provision on grounds for civil jurisdiction on the internet cases. Because a browse through the official websites of Nigeria and the United Kingdom (nass.gov.ng and legislation.gov.uk) respectively that keep the records of legislations and bills of these countries did not show any such legislation that provides grounds for jurisdiction on the internet in civil matters. In the case of Nigeria, the legislations that seem relevant are the Cyber Security Bill

2011 No. SB8, the Electronic Transaction Bill, and Cybercrime Act, 2015 but all of these Acts do not state grounds for jurisdiction in civil breaches.

Nonetheless, it can be argued that in the case of United Kingdom little or no problem would arise, if the plaintiff institutes his action in any of the European countries that is a signatory to the Brussels Convention⁷ which is the controlling document for jurisdictional issues within the European communities. The Convention set out the following basic jurisdictional rules:

- i. Person who is domiciled in a European member country may be sued in that country.
- ii. In contract matters, a person may be sued in the place of performance of the obligation in question.
- iii. A person may be sued in tort matters in the place where the event causing harm occurred.
- iv. A consumer may be sued only in the consumer's country of domicile, while a consumer may elect to bring an action in either his domicile or in other party's domicile, so long as the consumer was subject to a specific solicitation or advertisement in the consumer's domicile.
- v. In entering into contracts not involving a consumer, the parties can agree on a forum for dispute.

It is submitted that, online plaintiff in the United Kingdom can resort to any of the above provisions in selecting his court. However, he is left without any statutory guide when his claim is against a defendant outside European community.

Nigeria is a federation of states. Many of the states⁸ have "long arm" provisions similar to that of Brussels Convention⁹ enabling their courts to decide cases against a defendant-residing in

⁷ European Union Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (September, 30, 1968) also known as the Brussels Convention.

⁸ For example, Order 3 Rule 9 of the Kaduna State High Court (Civil Procedure) Rules, 2007

another state within the federation. Here too, an online plaintiff from one state in Nigeria can resort to those provisions to sue his defendant in another state.

In the case of a foreign defendant, the rules also empower the courts to entertain matters brought before it on certain areas, but none of the areas listed contemplates the cyberspace. For example, Order 8 Rule 1¹⁰ provides as follows:

Rule 1, A judge may allow any originating or other process to be served outside Nigeria where:

- (a) the whole subject matter of the claim is land situate within jurisdiction, or
- (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within jurisdiction, is sought to be construed, rectified, set aside or enforced, or
- (c) any relief is sought against any person domiciled or ordinarily resident within jurisdiction, etc.

The provision quoted above went on and on to mention ground for serving writ abroad but did not make provision for cyberspace. Regrettably, it therefore means that, like the online plaintiff in the United Kingdom, a Nigerian plaintiff cannot use the provisions to sue an online defendant outside Nigeria.

4.2.2 Use of Case Law for Personal Jurisdiction

Slowly though, our courts are making breakthrough decisions concerning the flux of cyber jurisdiction. In this regards, the courts develop two kinds of personal jurisdictions¹¹, in cyberspace cases, they are. ‘General Personal Jurisdiction’ and ‘Specific Personal Jurisdiction.’

In the Internet context, personal jurisdiction cases often involve proprietors of websites or Internet-based services that either advertise or actively promote their businesses nationally, but

⁹European Union Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (September, 30, 1968).

¹⁰ Kaduna State High Court (Civil Procedure) Rule, 2007

¹¹ By Julia, A. G. Op cit p.5

argue that they do not have sufficient contacts within a particular state to subject them to litigation in that state. With the growth of the Internet, courts have faced the challenge of applying long-standing principles of personal jurisdiction to a borderless communication medium that enables businesses and individuals all over the world to instantaneously interact across state boundaries as pointed above. Below is a brief discussion on each of them.

4.2.2.1 *General Personal Jurisdiction*

For a court to assume jurisdiction under this sub-head the plaintiff must establish that, the non-resident defendant has “systematic and continues” contact with the country he was sued¹².

What constitute “systematic and continues contact” as may be required by the court is not clear. But indications given by the proponents¹³ of this model seem to suggest that in deciding whether the defendant’s conduct is systematic and continues, the court will look at the nature and quality of the defendant’s contact with the forum, the fact that the defendant resides there or has the center of his business there.

For example, it will be sufficient for a plaintiff to show that, a defendant though residing outside jurisdiction is conducting business worth much amount of money within jurisdiction and on a regular basis or he has the center of his business within jurisdiction. This will establish in the eyes of the court that, the defendant is in a way linked to its jurisdiction hence amenable to its powers. This is sufficient even if the injury suffered by the plaintiff is completely unrelated to that country. The requirement that, a person may be tried at a country whether or not his action is connected to that country makes this standard less applicable¹⁴.

¹² Jay, K. Op cit p.5

¹³ Ibid. p.4

¹⁴ Ibid.

4.2.2.2 *Specific Personal Jurisdiction*

Two principal models for assuming jurisdiction under this sub-head are mostly used by the courts. The two models are known among the cyber community as “Zippo Test” derived from the case of *Zippo Mfg Co. vs. Zippo Dot Com, Inc*¹⁵ and the “Effect Test” derived from the pre-internet case of *Calder vs. Jones*¹⁶. Below is a detailed discussion on each of these models.

Zippo Test:

This test is also known as “continuum” or “sliding scale” test. This model posits that, jurisdiction would be assumed on a non-resident website on the degree of interactivity between the website and the forum. As noted above, this test was developed in the case of *Zippo Mfg Co vs. Zippo Dot Com, Inc*¹⁷ which is one of the earliest benchmark for internet jurisdiction. A brief look at the facts of the case is made to help us understand the test better.

In that case, *Zippo Mfg Co.* which is the plaintiff resides in Pennsylvania while the defendant *Zippo Dot Com* is a company with Californian residence. The plaintiff sued the defendant before a Pennsylvania court. In deciding whether or not it has jurisdiction over a non-resident defendant, the Pennsylvania court took time to classify websites into the following three categories.

- a. Passive website: this kind of website simply makes information available to interested viewer without more. The user can neither make contact nor the website operator take order from the user. The court held that, no jurisdiction can be assumed against this kind of website¹⁸.

¹⁵ Supra p. 5

¹⁶ 465 U.S. 783 (1984) Cited by Julia, A.G Op cit p. 5

¹⁷ Supra p.5

¹⁸ *Cubersell Inc, vs. Cybersell Inc.* 130 F 3d 414 (9th Cir Dec. 1997) Cited by Anand Singh op cit P.6

- b. Active or interactive website, as the name sounds, on this kind of website, the provider actively conducts its business over the internet, by displaying products and services and allowing the user to enter into contract and purchase the products or services advertised, most often charged to a credit card number given by the user. This website affords “minimum contacts” between the website and the forum. The court said, here jurisdiction can be assumed on the website. “Minimum contact” can be established once the following elements are present.
 - i. That the defendant purposefully availed itself of the privilege of doing business within the forum state (by accepting orders from the forum state);
 - ii. That the relevant cause of action arises from the defendant’s activities within the forum; and
 - iii. The exercise of jurisdiction would be fair and reasonable.
- c. The Middle Spectrum: this kind of website has blend of the character of the above two sites. On this kind, courts often state that, in order to determine the jurisdiction, an assessment and evaluation of the level of interactivity and commercial nature of the exchange of information that occurs on the website will be made.

After the above categorization of websites, the court placed the *Zippo* case under an active or interactive website due to the facts that, *Dot Com* operated a web portal accessible in Pennsylvania. The web portal requires registration by subscribers and a payment of monthly fee before access. *Dotcom* had received an approximate of 3,000 subscribers in Pennsylvania at the time of the suit. Because of these, the Pennsylvanian court found that, it had jurisdiction on the defendant though of Californian residence.

Ever since the case of Zippo was decided, a number of judgments followed suit. For example, in *CompuServe Inc. vs. Patterson*¹⁹, the defendant, Patterson a shareware programmer and resident of Texas, distributed and market his shareware through CompuServe shareware distribution service. When Patterson accused *CompuServe* of trademark infringement for allegedly selling substantially similar products of their own, *CompuServe* filed for a declaratory judgment in an Ohio Federal District Court asking for a declaration that it had not infringe Patterson's trademark. Patterson replied with a motion alleging that, the Ohio court lacks personal jurisdiction over him.

Applying the reasoning in Zippo, the court found there is specific minimum contact between *Patterson* and Ohio, specifically:

- a. Patterson purposefully and repeatedly dealt with an Ohio company.
- b. Patterson's CompuServe – based software sales and CompuServe's alleged infringement occurred in Ohio where CompuServe was based.
- c. Patterson's business contract with CompuServe should have given him notice that he might be required to answer law suit in Ohio (thus it is fair and reasonable).

The court held that, selling software through a company online service is enough to establish minimum contacts in the state where that company is located. Thus, Patterson is properly brought before it.

*Huggins vs. Boyd*²⁰, In this case involving a permanent protective order prohibiting Jonathan Huggins from stalking Karen Boyd, Huggins appealed the trial court's denial of his motion to set aside the order, arguing that the trial court had no personal jurisdiction over him. Because it was undisputed that Huggins (a South Carolina resident) engaged in the stalking

¹⁹ 89 F 3d 1257 (6th cir 1996)

²⁰, *Georgia Court of Appeals 2010 (304 Ga. App. 563)*

conduct (sending e-mails) only outside Georgia, and because it was further undisputed that Huggins engaged in no other conduct (persistent or otherwise) in Georgia, the protective order was reversed.

The reasoning in *Zippo* was rejected in two subsequent cases. There is the case of *Boschetto vs. Hansing*²¹, Plaintiff Boschetto, a resident of California, purchased a vintage car through eBay from defendant car dealership in Wisconsin. Upon receiving the car, plaintiff discovered many problems with the car which were counter to how the defendant described it. After failing to resolve the issue through eBay, plaintiff brought suit in the [United States District Court for the Northern District of California](#). The District Court granted a motion to dismiss for lack of personal jurisdiction and the Ninth Circuit affirmed this decision. The court specifically rejected the reasoning of *Cybersell*, effectively refusing to apply the *Zippo* test. Instead, the court applied a three-part test for establishing minimum contacts: (1) purposeful direction of activities toward the forum, (2) a claim arising out of or related to defendant's forum related activities, and (3) reasonableness, fair-play, and substantial justice. The court ruled that the lone transaction for the sale of one item did not establish purposeful ailment.

Holding: The Ninth Circuit departed from the *Zippo* test and held that specific jurisdiction is found by "minimum contact" through a three-part test: purposeful direction, a forum related claim, and fairness.

*Attaway vs. Omega*²², is another case, in this case, Defendants purchased a used car from plaintiffs through eBay. The auction stated that winners must make their own delivery

²¹539 F.3d 1011 (9th Cir. 2008).¹

²²No. 11A01-0712-CV-608 (Ind. Ct. App. March 13, 2009).

arrangements. After the completed transaction, defendants filed a claim to rescind payment because they alleged that the car was not as described, and succeeded in doing so through MasterCard. Plaintiffs brought suit for damages, and the defendants moved to dismiss for lack of personal jurisdiction. The motion was denied in the lower court, and the [Indiana Court of Appeals](#) affirmed the judgment. The court noted that this case may be the first case within which an eBay seller sued a buyer for rescission of payment after the item had been picked up in the seller's state.

The court applied the minimum contacts rule as well as the purposeful availment principle which aligns with the *Calder* test. It also rejected the *Zippo* test, declaring that eBay controls the interactivity of the website and not the seller. The court cites *Boschetto* for its similar fact pattern, but distinguishes itself because the transaction in the present case went beyond the single online purchase of *Boschetto*. Rather, the defendants had notice that their bid would result in an agreement to appear in Indiana to obtain the vehicle, whether in person or by representative. The court thus ruled that this qualified as a purposeful availment of the privileges of the forum state on the part of the defendants, and that jurisdiction was proper.

Holding: Personal jurisdiction is established through "minimum contacts" and purposeful availment by appearing (even through an agent) in the forum state to pick up an item sold through the Internet

The case of *Twentieth Cent. Fox Film Corp. v. iCraveTV*²³ presents an interesting scenario, in that case, [iCraveTV](#) was a Canadian Internet startup that offered real time streaming of television over the Internet. [Twentieth Century Fox](#) brought suit against the startup for

²³53 U.S.P.Q.2d 1831 (W.D. Pa. 2000).

[copyright infringement](#). Twentieth Century Fox obtained an injunction against iCraveTV from broadcasting within the United States. The United States court asserted jurisdiction over the Canadian company with significant ease, utilizing the United States registrant address attached to the company's website domain name. After issuance of the restraining order, iCraveTV decided to settle the lawsuit and discontinue its streaming service. The court held that, the United States has used a foreign company's website domain registration in the U.S. as justification for personal jurisdiction.

The reason why it is important is that, the court departed from the rule in *Zippo* which requires minimum contact, because obviously, this case does not satisfy that requirement. The basis of assuming jurisdiction in this case merely is the domain registration of the foreign company which is the U. S. Apart from its departure from the rule in *Zippo* the case also signal that, mere using of domain name is enough to make a company amenable to the jurisdiction of a foreign court.

Effect or Calder Test:

Although Effect or Calder test is not a panacea to *Zippo* test (supra), it is applied in cases with insufficient interactivity or minimum contacts as contemplated by the *Zippo* but the action is targeted at a particular forum. For this test to be applicable, all that is required is the defendant must have “purposefully directed” his conduct to the forum. The court will find that, there is “purposeful direction” when the plaintiff proves the following:

- i. An intentional action by the defendant; that was
- ii. Expressly aimed at the forum state; with

iii. Knowledge that the brunt of the injury would be felt by the plaintiff in the forum state²⁴.

A careful look at the cases decided using this test can help us understand it better. In *Calder vs. Jones* (supra), a pre-internet case, Florida residents who had essentially no physical presence with California wrote and edited an article in the *National Enquirer* which defamed *Jones*, a well-known movie actress residing in California. The *Enquirer* had greater circulation in California than any other state, and the material in the article was based on California sources. The Supreme Court found jurisdiction, holding that California was the focal point both of the story and the harm suffered.

It is very important to note that, the basic requirement of the test is “purposeful direction” of the effect of the defendant’s conduct not mere possibility that, the conduct of the defendant may have effect at the forum. Thus, if it is not purposely intended that an action should have effect at a particular forum, the mere possibility that, the action will have effect in that forum is not a basis for the applicability of this test.

*Blackey vs. Continental Airlines*²⁵, in this case, the plaintiff, Blackey filed suit against the defendants for defamation, sexual harassment and hostile work environment based on defamatory statements published by the defendants on the company’s web-forum. Applying the “Effect” test set forth by *Calder*’s case, the court held that the defendant’s statements were published with the knowledge or purpose of causing harm to the plaintiff in the forum state of New Jersey.

In *Yahoo! Inc. v. La Ligue Contre Le Racisme et l’antisemitisme (LICRA)*²⁶, the Ninth Circuit applied the *Calder* test to find that a California court could properly establish specific

²⁴ Julia, A.G. op cit p.5

²⁵ 751 A ed 538 (NJ 2000) Cited by Fleischman E. G. op cit

²⁶ 433 F.3d 1199 (9th Cir. 2006)

personal jurisdiction in a declaratory judgment action against two French civil rights organizations suing [Yahoo!](#) and Yahoo! France over the availability of Nazi content to French users of its services. Under the threat of substantial financial penalty, the French Court ordered Yahoo! in two interim orders to take "all necessary measures to dissuade and render impossible" access within France to sites displaying Nazi paraphernalia or other anti-Semitic content, and directed Yahoo! France to display an interstitial warning to users in France prior to enabling their access to Yahoo.com. While Yahoo! France substantially complied with the orders, Yahoo! resisted the French court's efforts to dictate changes to its US-based services. (Yahoo! later adopted a policy change addressing many of the French complaints, allegedly for independent reasons.)

In reviewing Yahoo's claim for declaratory relief, the Court applied a three-part version of the *Calder* test to determine if the effects of LICRA's action were sufficiently directed at California to establish personal jurisdiction, including whether the defendant: 1. committed an intentional act; 2. expressly aimed at the forum state, and 3. causing harm that the defendant knows is likely to be suffered in the forum state. Focusing on the French Court's orders, the Ninth Circuit found that compliance would require Yahoo! to perform significant acts in California as the servers supporting yahoo.com, which would have to be modified for compliance, were located in that state, thus fulfilling the first two prongs of the test. Although the penalties contained within the orders had not been enforced and the companies were in substantial compliance, the court found that the threat of future enforcement and the "very existence" of the orders constituted "harm" under the third requirement of the *Calder* test.

Holding: Personal jurisdiction under the *Calder* test can be established where a defendant's foreign court orders require modifying data located on servers in the forum state and

the threat of financial penalty for not performing the modifications constitutes harm. Note, however, that the court ordered the case dismissed because three of the judges (that believed personal jurisdiction was established) also believed that the case was not yet [ripe](#) and three other judges believed the court lacked personal jurisdiction, yielding a majority that favored dismissal, albeit for different reasons.

Finally, it remains to be emphasized here that, the courts are not embracing any of the above models or test as panacea to the dilemma of determining jurisdiction as both have limited scope but rather a combination of both the Zippo and the effect tests is being employed. Hence effect test may work where the Zippo test fails and vice versa.

4.3 CYBER – JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENT

From the discussion in chapter three the reader might not have difficulty understanding that, in private international law a foreign judgment can only be enforced or recognized in another country if that foreign judgment satisfies a number of conditions placed before it by the common law as well as the statutory provisions. Those conditions were listed and discussed in detail in chapter three. It may not be out of place to briefly reproduce them here. They are:

- That the judgment must have been delivered by a court of competent jurisdiction;
- The judgment must be final and conclusive between the parties; and
- That the judgment must be for recovery of money not being tax, penalty or other charges of like nature.

A point is also made that, of all these requirements, the jurisdiction of a court that delivers the judgment seeking to be enforced is the most important. This is because, jurisdiction

is the threshold of every court proceedings the absence of which nullifies the trial and its outcome no matter how excellently conducted.

Therefore, when a court is asked to enforce a judgment coming from another country, the first thing that the enforcing court will do is to find out whether or not the judgment placed before it for enforcement was delivered by a court of competent of jurisdiction. To do this, the enforcing court will measure the competence of the foreign court not by the procedural laws of the foreign court but by the procedural laws of the enforcing court. Using the laws of one country to test the competence of the court of another country is what makes the procedure complex.

Despite this complexity, the common law and the statutes of Nigeria and that of the United Kingdom have since settled the yardstick with which to measure when a court of foreign country can be competent to deliver judgment capable of enforcement in Nigeria or the United Kingdom.

In a nutshell, the yardstick states that, the judgment debtor must be physically present within the jurisdiction of the foreign court as at the time the action commenced such that the court writ can be served on him or where the defendant personally submits to the jurisdiction of the foreign court. After this settlement of the law, then comes the internet technology which creates the cyberspace. By its nature, the cyberspace is placeless though affords people the opportunity to relate almost in the same manner they do in the physical space. The question is, how do we locate the presence of a defendant in the cyberspace since by its nature is placeless.

This introduces the study of cyber – jurisdiction into our jurisprudence. It becomes necessary to develop standards with which to determine personal jurisdiction on an internet user. Because unless this is done, enforcement of judgment from online transactions may not be guaranteed since the enforcing court may not considered the foreign court that delivers the

judgment to be of competent jurisdiction. The resultant effect is that civil and commercial transactions online will be discourage for fear of not getting remedy in the event of breach.

4.4 CONCLUTION

The chapter discusses cyber jurisdiction as a requirement or condition precedent to enforcing judgments obtained from online transactions. The models so far developed by the courts to determine when courts can be competent to determine cases from online transactions were also discussed. But these models are by no means sufficient which necessitates the need for improvement. Otherwise judgment from online transactions will unenforce and this will negatively affects growth of online businesses that now booming.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 SUMMARY

Man does not live in isolation but in relationship with others. Thus, in the course of this relationship or co-existence, dispute or disagreement may arise. It is in anticipation of this dispute or disagreement that nations make municipal laws to regulate the relationships of their citizens.

Municipal legislations may not however be enough, because human relationship extends beyond borders of a single nation. Thus, a citizen of one country may relate with that of another and dispute may arise. This is even made frequent by the coming of the internet which turns the world into a global village. Since citizens of two different countries are involved, municipal laws may not be enough. This fact makes comity of nations to come up with private international law or conflict of laws to handle the situation.

Whether in the municipal or the international scenario, the laws permit a party feeling aggrieved from the relationship to go to the court of competent jurisdiction for redress. The court will make finding based on the evidence before it and pronounce judgment in favor of the successful party.

Many at times, the party against whom the judgment is given may not willingly comply with the terms of the judgment. This brings the need for the successful party to take further step of enforcing the judgment. To do this in case of the international scenario, the successful party is required by the rules of private international law to initiate the proceedings either at the country

where the defendant resides or where the defendant owns property(s) if different from his place of residence. The successful party can commence the proceedings under the common law or by using statutory provisions.

Whichever procedure (common law or statutes) the judgment creditor adopts in enforcing his victory, the judgment sought to be enforced must possess some requirements before it is enforced. The first requirement to be considered by the foreign court before enforcing the judgment is whether or not the forum court is one of competent jurisdiction as understood by the foreign court¹. Unless this requirement is satisfied, no further step could be taken and the judgment becomes a nullity. Doing this does not present any difficulty because the standards or principles of determining jurisdiction were firmly established². The principles or the standards were geographically or territorially based to ensure the sovereignty of political states, which means the judgment debtor has to be within the territory over which the court has competence.

The certainty was however disrupted by the emergence of computer technology which creates the cyberspace. This is because, the certainty was achieved based on the principle of territorial sovereignty.³ On the contrary, the internet does not respect this principle. It is placeless and universal.⁴ Consequently, the standards used during the pre- internet era may not suit the internet. This brings about the need to develop models or standards that could fit the cyberspace. The models developed so far are still deficient to cater for the cyberspace.

In addition to the requirement of jurisdiction, the judgment must also satisfy other requirements. These other requirements are, that the judgment is final and conclusive between

¹ Emanuel vs. Symon (supra)

²Teleglob America Inc. vs. 21st Century Techni LTD (supra)

³Emanuel vs. Symon (supra)

⁴Anand Singh op.cit

the parties and that it is for the recovery of money not being tax, penalty or like charges. Once these conditions are satisfied, the judgment becomes enforceable unless the judgment debtor can show cause to the contrary.

5.2 FINDINGS

From the foregoing discussion, this research work makes the following as far enforcement of foreign judgments in Nigeria is concerned.

Firstly, the legal regime for the enforcement of foreign judgment in the United Kingdom is more comprehensive and flexible than in Nigeria. This is because of the fact that, the United Kingdom has enough legal instruments to regulate the enforcement of judgment coming from virtually every country in the world. A foreign judgment creditor is surer of the enforcement mechanism to use in enforcing his victory. The Lugano and Brussels Conventions make enforcement easier of judgments coming into England from the European Community for enforcement.

Secondly, the use of international conventions appears to be one of the most effective solutions to the challenge of cyber-jurisdiction. This is because this is one of the ways through which the comity of nations can come together and agree on a common front to go about it. However, the provisions of Articles 10 and 11 of United Nations Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and item 4 of the Supplementary Convention did not introduce anything new to address the challenge of cyber-jurisdiction.

Using discretionary powers, the courts have developed “Zippo Test” which under the court has consistently ruled that no jurisdiction could be found on a “passive website”. The

researcher holds the humble view that, there could be information on a “passive website” which could in one way or the other cause civil injury to someone. For example, company ‘A’ may post an informative advert of a product (with no intent of taking order from customers) which may be passing off the product of company ‘B’ using a passive website. By the zippo test therefore company ‘B’ may not have any remedy. The “Effect Test” emphasis on “purposeful direction” as the yard stick for its application has limited its scope. The internet is placeless because it could be accessed anywhere in the world. By implication therefore, information stored on the internet is of course “purposefully directed” to the whole world not necessarily a particular place.

5.3 RECOMMENDATIONS

The researcher recommends the following to make enforcement of foreign judgments in Nigeria and the United Kingdom in line with the present technological realities

Firstly, the Attorney General and Minister of Justice should exercise the power vested in him by s.3 of the Foreign Judgment (Reciprocal Enforcement) Act which will have the effect of expanding the number countries whose judgments can be registered in Nigeria. This will instill confidence in the mind of foreigners doing business with Nigerians and in turn promotes investment in Nigerian.

Secondly, there is an urgent need to amend the provisions of Articles 10 and 11 of United Nations Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and item 4 of the Supplementary Convention by taking away jurisdiction as a condition for recognition and enforcement of foreign judgment from online disputes owing to the universal nature of the internet. Let justice of the case be the driving factor in enforcing the case. Once it is just and fair to enforce the case, the enforcing court should go ahead to enforce it

and make the judgment debtor honour the obligation reposed on him by the foreign judgment provided that the rendering court is competent to entertain the case in accordance with its laws, whether or not the laws coincide with that of the enforcing court. This will also complements the defects that the models developed by the court suffer from.

Thirdly, to avoid the risk of not having their judgments enforced in foreign country, business partners should endeavor to sign an arbitration clause in advance. The use of arbitration seems to be the most effective way to handle both offline and online conflict. This is because in both the networked environment and arbitration process the physical location of the parties is irrelevant. Because arbitration allows the parties to select their judges/arbitrators, attorney, procedure, choice of law, language, location which might of course be an 'online place', enforceability of arbitral award etc. Parties have total control over how they want to resolve their conflicts as long as they do it in advance by signing an arbitration clause. The above lots of convenience make it better for the parties to have their conflict arbitrated rather than litigated. This will substantially take care of the limited scope the two tests or models so far in use are suffering from. In doing this, the parties can avail themselves the provisions of UNICITRAL Arbitration Rules 2010.

5.4 CONCLUSION

The chapter summarizes the entire work by given a brief account of the work is and intends to achieve. Findings are stated to the effect that, though efforts were made at providing models that could take care of the apparent lacuna in the law, the effort is not sufficient which calls for more efforts. Some recommendations were put with hope that, if they are implemented, some progress will be recorded in this regard.

